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October Term—1921

Calendar No. 295

CHARLES D. NEWTON, as Attorney General of the State of New York, ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District and HARRY E. LEWIS, as District Attorney of the County of Kings,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLANT HARRY E. LEWIS AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS.

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Appellants,

against

KINGS COUNTY LIGHTING COMPANY, *Appellee.*

BRIEF ON BEHALF OF APPELLANT, HARRY E. LEWIS, AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS.

Appeal from the Southern District of New York.

Statement.

This is a suit in equity instituted by the above-named appellee against the appellants herein to have declared unconstitutional and void, as to it, Chapter 125 of the Laws of 1906, as amended by Chapter 604 of the Laws of 1916, upon the ground that the statute is in contravention of Section 10, Article I of the Constitution of the United States and the Fourteenth Amendment thereof.

The constitutionality of Chapter 125 of the Laws of 1906 was upheld by this Court, in *Willcox* v. *Consolidated Gas Company of New York*, 212 U. S., 19. The issues in this case were referred to GORDON AUCHINCLOSS, Esq., as Special Master, whose report was confirmed on October 13, 1920, by Hon. CHARLES M. HOUGH, sitting as a District Judge.

Appellant's appeal was taken and a motion was made to advance the argument of the same. This Court advanced the case for hearing at the October, 1921, Term.

Many of the questions have been thoroughly treated in the brief filed by us in the *Consolidated Gas Company* case, and what we have said with reference to the questions of burden of proof, abnormal period, earnings of prior years, admissibility of the books of account in evidence and the schedules drawn therefrom, applies also to this case and we will not attempt to again cover those points herein. It will be necessary, however, to add something to what we have said, by reason of different facts which are presented by this case.

POINT I.

The judgment should be reversed and the complaint dismissed by reason of the judgment entered in the State Court.

The complainant herein commenced an action in the Supreme Court of the State of New York on July 1, 1916, the date when Chapter 604 of the Laws of 1916 took effect, and sought the same relief and judgment which it now seeks in this action. The defendants were the same except that The City of New York was made a party defendant in the said action, and the District Attorney was not included as one of the defendants. The case was tried before Mr. Justice GREENBAUM and a judgment was entered on March 29, 1920, dismissing the complaint (110 Misc., 204). The plaintiff has appealed from this judgment and the appeal is now pending. The findings, amongst others, were as follows:

> "The substantial observance of the requirements of the statute as to candlepower should have been shown by the plaintiff, and its failure to do so does not entitle it to favorable consideration of a court of equity."

The State Court had similar jurisdiction to this Court over the parties and subject-matter in litigation.

The complainant admits that it has made no attempt to comply with the Law since January 1, 1918, in spite of the decision of the Court condemning its practice. Instead of mending its ways, as pointed out in that judgment, it commenced a second action in this Court.

This record is full of instances showing that no effort has been made to remedy any of the conditions that were condemned in the prior suit.

It is a well-settled rule that a question which was raised in a prior suit and passed upon conclusively settles the question and is not the subject of litigation in a subsequent action in the same Court or in any other Court upon the same or a different cause of action (23 Cyc, p. 1216).

POINT II.

The complainant has never experimented with the statute fixing the rate, for 22 candlepower gas, at 80 cents per thousand cubic feet.

The decision of Justice GREENBAUM (110 Misc., 204) in the Supreme Court of the State of New York in which the complainant in the case at bar was plaintiff, shows (at p. 248) first, that during the year 1918

> *"plaintiff continuously furnished gas of a candlepower below the legal standard of 22 candles and varying from a maximum monthly average of 16.94 candles to a minimum average of 11.18 candles. There was not a single day during the year 1918 when the plaintiff furnished gas up to the standard prescribed by law. There were many occasions when the gas was found to be below ten candles."*

The Special Master in the case at bar has found that for this kind of gas complainant received 95 cents per thousand cubic feet.

Secondly, Justice GREENBAUM required experimentation with the rate as a condition to re-opening the case for the purpose of showing that the statute was confiscatory (see page 250). The complainant could not make any experimentation with the statutory rate for the years that the Court had under consideration at the trial, but only for years of the future, which were the years 1919 and 1920. The Special Master in the case at bar has found (Finding No. 39) that the "taking of testimony in said case [meaning the case in the Supreme Court] was concluded in April, 1919. The opinion of the Court was handed down January 27th, 1920" (Rec., p. 38).

This discloses that the complainant was required to experiment with a period of operation subsequent to "January, 1920." The learned judge of the Court below has therefore ignored the condition imposed by this decision and granted equitable relief, notwithstanding that the question was *stare decisis*. This is tantamount to a reversal of the decree of the Supreme Court of the State of New York, a court of complete jurisdiction in the premises, by a court having no authority to reverse decrees of the State courts.

The practice of the complainant, continuously since January 1, 1918, of furnishing to its consumers illuminating gas approximately 35 per cent. deficient in the standard of quality required by law, and selling it for 95 cents per thousand cubic feet, is obviously not experimenting with the statutory rate.

We urge upon the Court the necessity of requiring complainant to now begin a course of adequate experimentation with the statutory rate, and herewith submit authorities in support of our position in the premises.

In *Louisiana R. R. Com.* v. *Cumberland Tel. Co.*, 212 U. S., 426, this Court said:

> "We say this because the evidence shows that in the case of telephone companies the general result of a reduction of rates in some other kinds of business does not always follow, namely, that there would be an increased demand, which could be supplied at a proportionately less cost than the original business. Such, it is admitted, would be the case generally in regard to water companies, and perhaps some others where the rate is a reasonable one. For example, it is said that it would cost no more, or certainly scarcely an appreciable amount more to haul a train of two cars both filled than it would to haul the same train with both cars half filled, and if the reduction in rates should result in filling the cars where previously they had not been half filled there might be an increased

carriage at a cost very little more than before and probably an increased profit. So in the case of a water company the reduced rate might result in furnishing more water to consumers already existing and the increased cost of furnishing the same would be infinitesimal where there was a supply sufficiently large to fill the demand. *So, also, in furnishing gas at reduced rates, the reduction in the rate would very probably result in increased consumption*, not only in increased demands from more consumers, but also an increased consumption by consumers already existing and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption. In these cases increased profits might be result of decreased rates."

The rule laid down by this Court is especially applicable to the appellee because it is doing business in the same city, under practically the same local conditions, and under the same statute that was attacked in *Willcox* v. *Consolidated Gas Co.* (212 U. S., 19). Chapter 604 of the Laws of 1916, which is herein assailed, is an amendment of Chapter 125 of the Laws of 1906, which was passed upon in the Consolidated case. It might fairly be urged that the decision in the latter case is an adjudication which positively must be followed in the instant case.

In the former case the Court required that an actual experiment be had with the new rate, and it may be observed that ten years elapsed before the Consolidated Gas Company undertook to assail again in Court the statute which it sought previously to have declared confiscatory. The Court said:

"The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate, when not based upon the actual cost of material and con-

struction. Deterioration of the value of the plant, mains and pipe, is also, to some extent, based upon opinion. All these matters make questions of value somewhat uncertain, while added to this is *an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction of the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate* * * * but where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation and based upon the value of the property found by the Court below, and that the division depends upon divisions as to value which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is kept very much in doubt, a Court of equity ought not to interfere by injunction *before a fair trial* has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts" (212 U. S., 42).

And later, in the same decision, the Court said:

"The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost *can be answered only* by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow, we cannot say that there is no fair or just doubt about the truth of the allegation that the rates are insufficient" (212 U. S., 51).

And in conclusion the Court said:

> "Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or reasonable doubt that the acts of the Legislature of the State of New York are, in fact, confiscatory" (212 U. S., 54).

How closely this Court adheres to this rule requiring actual experiment is shown in Knoxville Water Company v. Knoxville (212 U. S., 14). The Court said:

> "The case is peculiar. The company has never observed the ordinance. The suit was begun nine months after its enactment, and tried considerably later * * *. In this case there could be no *absolute certainty* because the ordinance had never been put in operation, but evidence of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty be obtained * * *. The jurisdiction thus invoked here, and as has been said to be exercised only, in the clearest cases. *If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into Court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the Court that the ordinance would necessarily be so confiscatory* in its effect as to violate the Constitution of the United States."
>
> (Citing *ex parte Young*, 209 U. S., 123; *San Diego Land & Town Co.* v. *National City*, 174 U. S., 729, 754;
> *San Diego L. & T. Co.* v. *Jasper*, 189 U. S., 439).

"If hereafter it shall appear that the actual operation of the ordinance that the returns made

by it operate as a confiscation of property; nothing in this judgment will prevent another application to the courts of the United States or the courts of the State of Tennessee" (212 U. S., 19).

To meet the assertion that this rule was laid down only in exceptional cases, we call the attention of the Court to the following cases:

"While we agree with the Court below that it was right * * * we think, in view of the fact that the attack upon the rate was made before the advance went into effect, and before actual application of the rates could be demonstrated whether they were remunerative or not * * * the Court should have dismissed the bill without prejudice."

(*Des Moines Gas Co.* v. *City of Des Moines*, 238 U. S., 153).

"The evidence for complainant tending to show they were non-remunerative, while based upon actual experience in the operation of the rate, yet relates to only a brief period when these were abnormal * * * but it is sufficient for the present to show that the *experimental period was too brief*, and the decree under review should be so modified that the dismissal of the bills shall be without prejudice to another suit * * * if after a *full and fair test* they shall be found to be confiscatory."

(*Darnell* v. *Edwards*, 244 U. S., 569, 570, *citing Knoxville Water Co.* v. *Knoxville*, and *Willcox* v. *Consolidated Gas Co.*, *supra.*)

"We are far from saying that the argument for doing so does not seem to us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of con-

stitutional law. But we can express no opinion upon it now * * *. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Nor. Pacific Ry. v. *Nor. Dakota*, 236 U. S., 581.

In this case the test was made under the rates in question and the case reopened after a year and finally passed upon by this Court (236 U. S., 585):

"If thereafter it shall appear that under actual operations of the plant, under these rates, the return allowed by such corporation commission operates as a confiscation of the property of complainant * * * she may at the expiration of one year again present her evidence to the Court and obtain appropriate relief on the facts then presented."

Van Dyke v. *Geary*, 218 Fed., 111, aff'd in 244 U. S., 49, citing *Knoxville Water Co.* v. *Knoxville* (212 U. S., 1).

"When it is remembered what clear evidence the court requires before it declares legislation otherwise valid, void on this ground (confiscation) and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of the opinion the result is too near the dividing line not to make *actual experiment necessary.*"

City of Louisville v. *Cumberland Telephone & Telegraph Co.*, 225 U. S., 430.

In *Penn. R. R. Co.* v. *Towers*, 245 U. S., 6, this Court affirmed 126 Md., 59, which refused an injunction and held:

> "and that although the order involved fixed rates for ten years, there should be reserved to the company the right to apply to P. S. C. after reasonable time for the right to rescission or modification of the order, if *experience* demonstrated that the revenue derived under the tariff as established was not properly compensatory for the services rendered."

Following the same rule the Court, in *Montana W. & S. R. Co.* v. *Morley*, 198 Fed. Rep., 991, held that where a freight rate had been made for the future and a *reasonable time had passed during which it had been applicable*, the revenue derived therefrom would be regarded in determining whether it is remunerative or confiscatory.

> "We recognize fully the authority and wisdom of the views of the Supreme Court * * * 'that a case ought to be a clear one before the Court ought to be asked to interfere with state legislation upon the subject of rates in advance of *an actual experience of the practical* results of said rates'"

Boubright v. *Geary*, 210 Fed., 44.

> "Where a fair trial for a year of rates of intrastate business established by a state has demonstrated that they are not compensatory to a railroad it is entitled to an injunction to restrain their further enforcement without reference to what might be their effect if continued."

In re Arkansas Rate Cases, 187 Fed., 290.

> "The ordinance was never put in force. Within a few days after it went into effect, this bill was filed and an injunction *pendente lite* granted," etc. * * * "The inquiry in cases of this character is not alone what has complainant theretofore

earned but it is what will be the effect of the ordinance reducing the rate upon the future net earnings of the company and it devolves upon complainant to show not that the past rates have not produced a reasonable return but that the rate prescribed by the ordinance will not in future produce a reasonable return."

Lincoln Gas Co. v. *Lincoln*, 223 U. S., 361.

"As the ordinance was passed in 1906 and had not yet been enforced, the Supreme Court of the State dismissed the bill without prejudice to a rate suit after it should have been given a fair test (144 Iowa, 426). The plaintiff, having specially set up that the ordinance violated the contract clause of the Constitution (Art. 1, Sec. 10) and the Fourteenth Amendment, bring the case here * * *.

But there is nothing of which we can take notice in the case that could warrant us in changing the result or in saying that the plaintiff did not get as much as it could expect when leave was reserved for it to try again."

Cedar Rapids Gas Co. v. *Cedar Rapids*, 223 U. S., 666, 670.

"May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business and therefore the earnings? At any rate, must the Court assume that it has no such effect; and ignoring all other considerations, hold as a matter of law, that a reduction of rates necessarily diminishes the earnings."

Chicago, etc., Railway Co. v. *Wellman*, 143 U. S., 344.

In this case it was shown that, on the very day the act went into force, the application for a ticket was made, a suit begun and within two months a judgment obtained in the Trial Court.

While we are discussing this point, we may appropriately refer to *Commonwealth* v. *Interstate Consolidated Railway Company*, 187 Mass., 436, in which the Court said:

> "Nothing less than a certainty that the provision (half rate fare to children) would cause loss to the railway companies or some of them, would enable us to hold that the Legislature was powerless to make the requirement * * *.
>
> * * * Was it not possible that the Legislature to decide * * * that the number who would ride at the half rate would be nearly, if not twice as many as at the regular rate and that for these and other companies would suffer no loss from carrying children at half the regular fare?"

This case was appealed to this Court and in 207 U. S., 79, Mr. Justice HOLMES wrote as follows:

> "I am not prepared to overrule the decision of the Legislature and of the highest Court of the State of Massachusetts, that the requirement (half fare rate) is reasonable under the circumstances existing there; upon evidence that goes no higher than this (which was to the effect that a considerable percentage of the passengers carried by the railroad consisted of school children).
>
> * * * * * * *
>
> It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power."

The New York Court of Appeals has recently followed the same doctrine, and in expressive language declared (*Municipal Gas Co.* v. *City of Albany*, 225 N. Y., 98):

> "On the contrary, through repeated decisions, there runs the consistent thought, in controversies of this order, experience is the final test, that the

Court must bide their time, and let the working of the law decide." (Citing *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1; *North. Pacific Ry. Co.* v. *North Dakota*, 216 U. S., 579; *Cedar Rapids Gas Light Company* v. *City of Cedar Rapids*, 223 U. S., 655, 670; *Missouri* v. *C. B. & Q. Ry. Co.*, 241 U. S., 533, 540; *Darnell* v. *Edwards*, 244 U. S., 564-570; *Van Dyke* v. *Geary*, 244 U. S., 39.) "Bills to annul rates have been dismissed *without prejudice*, 'while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event'" (*Northern Pacific R. R. Co.* v. *North Dakota*, 236 U. S., 585; *Missouri* v. *C. B. & Q. Ry. Co.*, 241 U. S., 540).

It is not improbable that the effect of the amended statutory rate would be to somewhat reduce the earnings of the company during the first year, but all experience shows and this Court has recognized it in many cases that the probable effect of a reduced rate on such a commodity as gas would be to greatly increase the consumption without a corresponding increase of expense, and that in time the increased consumption of gas, resulting from the reduced rate, would be sufficient to more than overcome the amount of the reduction.

It is notable that, in spite of the competition of the electric light, the consumption of gas is steadily increasing and the number of new customers may be counted by thousands.

If it be argued by the complainant that the conditions under which the company operated since the enactment of the statute assailed have been such that manifestly there would have been no difference in the result so far as the returns upon the value of the property were concerned, had the company actually obeyed the statute and

put into effect the 80-cent rate, then we respectfully submit to the Court that there is no evidence in this case to show such a conclusion, and that such a deduction from what has been put in evidence in this case would be purely conjecture.

The suggestion was made during the trial that the complainant could show evidence from which it might be deduced that in all likelihood the results so far as the percentage of return upon the fair value of the property of the complainant was concerned, would not have been changed had the 80-cent rate actually been followed. But the complainant has brought forward no such evidence from which a fair conclusion in this matter may be drawn.

A recent decision was handed down by this Court in the case of *Lincoln Gas & Electric Light Company* against the *City of Lincoln* (250 U. S., 266). It will be recalled that this case had formerly been up on appeal to this Court. In the first instance it had not been referred to a Master and the Court hearing the case made no specific findings.

The decree of this Court reversed the decision of the Court below with directions to refer to a Master with leave to both parties to take additional evidence. The Court below followed these instructions and appointed a Master who reported his findings, both of fact and law. The Master's report was confirmed by the District Court, from which an appeal was again taken to the United States Supreme Court.

This decision positively confirms the proposition which we have above asserted that an actual test must be made of the statutory rate before it may be assailed in Court. This Court said as follows:

> "Pending the hearing upon the Master's report, and on or about May 1, 1915, complainant, notwithstanding the injunction *pendente lite,* put into

effect a net rate of $1 per thousand feet for gas, and has maintained it since.

Upon the strength of this test, and before the argument of this the second appeal, complainant presented to us a petition for leave to file a bill of review in the court below upon the ground that, according to the Master's findings, complainant, in the year 1907, earned so small a return that the rate ordinance would have been confiscatory upon the valuation as found by him, but for this additional finding: 'All human experience has shown that increased consumption follows quickly a reduction in the price of commodities, and the evidence in this case satisfactorily shows that gas is no exception to the rule.'

The petition averred that the experience of complainant in an actual test of the reduced rate during a considerable period since May 1, 1915, showed that the view of the Master was erroneous, and in fact under actual operating conditions there was no increase of consumption.

The application for leave to file a bill of review will be denied, for the following reasons:

First because the $1 rate was put into effect pursuant to a written stipulation made between the parties in the cause to the effect that the action of the company in so doing should not be construed as an acceptance of or compliance with the ordinance in controversy, and *should not be 'shown in evidence or presented to the court in the above-entitled cause, or used* in any way by either party to influence the action of the court in the disposition of the case.' *Hence defendant was not called upon to observe the effect of the reduced rate or prepare to meet inferences drawn therefrom.*

Secondly, because complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January, 1909, this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case of

subjecting prescribed rates to the test of practical experience before attacking them in the courts. Knoxville v. *Knoxville Water Co., 212 U. S., 1, 16, 18. Willcox v. Consolidated Gas Co., 212 U. S., 19, 54. When those decisions were announced this case was pending in the Circuit Court, and shortly thereafter it was decided adversely to complainant upon the question of the validity of the rate, the Knoxville and Willcox cases being cited. 182 Fed. Rep., 926, 929. Then, if not before, complainant might have made a practical test of the sufficiency of the rate, instead of waiting six yearss longer before doing so. The litigation has been extremely tedious and burdensome to both sides and it ought now to be brought to a conclusion upon the record as it stands.*

* * * * * * *

Without going into details, we content ourselves with announcing our *general conclusion that having regard to the entire period under investigation, we are unable to say that the Master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912, the net return was close to the line, if not below it; but that in the other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test.*

The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought *to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions."*

Mr. Justice GREENBAUM, in the trial in the State Court (110 Misc., 204) said:

> "This action was commenced before the legislative act here assailed went into effect and was not brought on for trial until the latter part of 1918. If the court had before it only the experiences of the plaintiff during 1916 and a few years prior thereto, showing as they do substantial incomes annually, it would have been justified in dismissing the bill upon the evidence, for the reason that the plaintiff had made no practical test by actual operation under the 80 cent rate (*Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1, 14, 15; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 42; *Municipal Gas Co. of City of Albany* v. *Public Service Comm'n*, 225 N. Y., 89). As matter of fact the plaintiff has been collecting from its customers since the commencement of this action at the rate of 95 cents per thousand cubic feet of gas, pursuant to an order of the court, the excess of 15 cents above the legal rate having been deposited with a trust company pursuant to such order.
>
> The court, however, took proof as to expense of operations, subsequent to July 1, 1916, and down to December 31, 1918, to afford the plaintiff an opportunity to establish that at an 80-cent rate, confiscation would ensue, despite an economical and efficient operation of the works and a largely increased income because of a lower rate (*Willcox* v. *Consolidated Gas Co., supra*, at p. 42).
>
> It is obvious, unless the evidence is conclusive that confiscation is inevitable under the present law, that it would be mere speculation in the absence of an actual experimentation to find whether the increased business would or would not sufficiently overcome the reduction in price. Under such circumstances the plaintiff would not meet the burden that rests upon it (*Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19)."

It is clear, therefore, that the complainant's suit must fail for the reason that it has failed to make a practical test of the 80c. rate.

POINT III.

Candle Power.

The defendants assert that complainant is not entitled to equitable relief, because it has persistently violated the statute requiring it to furnish gas of twenty-two candle power.

In the recent case of

Carmen v. *Fox Film Corporation*, 269 Fed., 928,

the Court refused to interfere on behalf of an infant who sought to have certain contracts declared void, which she alleged had been made during her minority. The Court said at page 932:

> "The maxim that one who comes into equity must come with clean hands expresses rather a principle of inaction than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition if he has been guilty either of unlawful or inequitable conduct respecting the subject matter of the litigation."

The opinion of Judge LEARNED HAND, in the *Consolidated Gas* case (267 Fed. Rep., 243), stated that the requirement

> "must of course be regarded as a duty imposed upon the plaintiff while it remains upon the statute book. A persistent and deliberate disregard of it might, I should think, bring this case within that somewhat indefinite rule which turns out of a court of equity a suitor who has himself been unjust in the very matter of which he complains."

The complainant, according to the Court, did not dispute that it has not furnished its consumers with gas of the quality required by the statute.

It is furnishing a counterfeit gas.

In *Kings County Lighting Company* v. *Lewis et al.* (*ante*), the case tried recently in the New York Supreme Court, Mr. Justice GREENBAUM said:

> "* * * Moreover, it may well be urged that if the plaintiff has knowingly violated the law by selling gas of a standard lower than that fixed by law, it is not entitled to equitable relief. Observance of the law is a cardinal principle which is obligatory upon him who seeks judgment in equity."

The officials of this company "knowingly violated the law by selling gas of a standard lower than that fixed by law."

The quality of the gas manufactured by complainant is a necessary factor to be considered in connection with the income of the company. It has not attempted to prove or estimate how much the income would have been increased if it had provided the consumers with candle power gas. It necessarily follows that because of the increased purchase of gas, the income would have been greater than it is alleged to have been, if the company had sold 22-candle power gas.

In *Kings County Lighting Co.* (*ante*), Judge GREENBAUM said:

> "* * * The daily tests of gas made by the legal inspectors established that the average quality of the gas supplied by the plaintiff during 1918 was an average of 13.57 candles instead of 22 candles, which is the minimum by law. It follows that the consumer was either compelled to consume a greater quantity of gas measured by the

ratio of 22 to 13.57 at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of 13.57 to 22 for which he paid the price charged for gas of a 22-candle power standard.

"How can one foretell how much increased business the plaintiff would have had if it had furnished the legal 22-candle power instead of the very considerably diminished candle power that it furnished in 1918? The use of gas has been largely extended during the past few years for cooking, heating water, house heating and other purposes. A standard quality of gas should insure a more extensive use of gas. At any rate a fair test under the law cannot be made except by compliance with the law which fixes the standard of quality." * * *

The Master has found that the complainant has been charging for gas at the rate of 95 cents per thousand cubic feet since July 1, 1916 (Rec., p. 38). Since January 1, 1919, the monthly average of candle power furnished by complainant has been 15. The company is required by statute to furnish 22-candle power gas at 80 cents per thousand cubic feet. It has restrained public officials from enforcing the statute for almost four years, and ignored the statute after the restraint was off. Without the sovereign authority of the State, it adopted its own method of fixing gas quality, of which the Master approves, and sold the product it manufactured, not at 80 cents per thousand cubic feet, nor even at 95 cents, which the Master finds, but at $1.38 per thousand cubic feet. Selling fifteen candle power gas for 95 cents is equivalent to selling 22-candle power gas for $1.38. The Court below finds, however, that the company is not compensated and is entitled to equitable relief. *Moreover, he finds that there has been a sufficient experimentation*

with the statute it has assailed as non-compensatory, notwithstanding that there has been no effort on the part of the company to comply with the requirements of the statute.

In actual results the discrepancy is even greater than shown above, because efficient use cannot be made of a gas that varies in quality from day to day.

The Master, however, disregards the obvious inequity and excuses the complainant's default, and its consequent defiance of the regulating power of the State, by giving full credence to the company's alleged inability to get sufficient gas oil.

If Congress passed a law permitting the fixing of prices per pound of food commodities, and created a special board to enforce such an act, we feel sure that the courts would punish those who arbitrarily decided to sell and did sell 12 ounces of sugar and call it a pound. There would be no defense available to the dealer that sugar was scarce. The analogy herewith presented is complete with the facts in the case at bar—15-candle power gas is not 22-candle power gas any more than 8 or 12 ounces is a pound.

We urge upon the Court to consider the illegality, and the obvious unfairness of complainant to its consumers, in selling extremely low and variable candle power gas at a price in excess of that fixed by statute. The Legislature determined that complainant must give the consumer 22-candle power gas at 80 cents per thousand cubic feet. The complainant not only failed to meet the standard but furnished gas of exceedingly inferior quality.

The City reported the result of its tests to the company each day (Rec., pp. 202-3), and no complaint was ever made to the City by complainant that said tests were

not accurate. In addition, the City deducted from the complainant's bills a proportionate amount to cover the deficiency in the candle power of the gas furnished.

The tests made by the City of New York are made by gas testers employed by the Department of Water Supply, Gas & Electricity of the City of New York. These men are experts in their line and made daily reports under oath as required by Chapter 735 of the Laws of 1905.

The situation presented in this case bears no resemblance to the state of facts passed upon in the *Consolidated* case hereinbefore referred to. There is no question in the instant proceeding about the accuracy of the readings taken or methods used by the official City gas testers. Their results are uncontroverted.

The testimony shows many violations of the statute, and the undisputed evidence is that these continued over a long period (Comp. Ex. 15-17, Rec., p. 1037). The complainant furnished no proof that it had complied with the statute. It admitted the violations repeatedly complained of and merely offered lame and insufficient excuses, such as its alleged inability to obtain oil in sufficient quantities to thoroughly enrich the gas.

The Illinois Commission, *in re Central Illinois Public Service Co.*, Case No. 7617, reported in P. U. R., 1918, E., pages 357-358, said:

> "The petitioner has displayed a lack of effort and interest in its gas business, and the quality of the service has been sufficiently bad to discourage the use of gas, and for these and other reasons, more fully set forth in this opinion, the company need not expect consumers to pay a return for poor service equal to that allowed heretofore in the order issued in connection with gas utilities that have been ably managed and developed."

The Wisconsin R. R. Commission recently decided a case reported in P. U. R., January, 1921, said:

> "We find:
>
> 1. That the gas service furnished by this Company to these communities is inadequate and unsatisfactory.
>
> 2. That no increase in rates for gas should be given consideration until the service rendered in the gas department shall conform in a reasonable manner to the standards laid down by this Commission."

Similar findings have been made by other commissions.

Complainant has at all times been in a position to furnish the gas prescribed by the statute but has refused to do so. It might have made application to the Public Service Commission for authority to change the standard from Candle Power to B. T. U. under certain conditions; but there is nothing in the record to show that it ever made any such effort.

While we maintain that the heating value is not an issue in this case, because not mentioned in the statute, we say that the heating value of the gas as measured at the plant of the complainant is not evidence of the heating value at the consumers' premises.

In finding number 11 (Rec., pp. 31-2), the Master gives a table showing the alleged heating value of the gas manufactured. He does not state how much *more than 620 British Thermal Units* there is normally and unavoidably contained in gas of 22-candle power. He altogether fails to show that the law requires complainant to deliver gas of 22-candle power measured at least one mile from the plant. He has not been informed that there is a very great difference between a gas of 524.07 B. T. U.

value tested at the plant and one with 22-candle power (or say 650 B. T. U.) tested one mile from the plant. He seemingly does not understand that a manufactured gas having only 3.08 candle power can have only an exceedingly small heating value. He is not aware that a monthly average heating value does not mean anything in itself so far as concerns uniformity of heating value, but it is demonstrated beyond all question that the gas during June, 1920, varied at least as much as 100 per cent. above the low point in heating value because the candle power value was around 4 on June 2nd to 7th inclusive, while the monthly average was 8.04. Whereas we might admit that a 22-candle power gas may vary considerably from day to day in its heat value, although not over 10 per cent., we know of no gas engineer who would not swear that as between a 3 or 4-candle power gas and an 8-candle power gas the difference in the heating value would be in almost direct proportion to the candle power. We thus see that the complainant has demonstrated, by its evidence, the fallacy of the opinions loosely expressed by its experts that heating value gas is more uniform than a gas measured by its candle power. We positively dispute the finding of the Master, number 14 (Rec., p. 33), "the heating value standard tends to increase efficiency in consumption, by insuring uniformity of quality." We deny that the record shows any basis for the conclusion that up to May 1, 1920, the gas furnished was of uniform heating quality. He has no means of knowing what heating value was furnished. *No regulatory body has ever prescribed a test of gas based upon its heating quality measured at or near the relief holder.*

The testimony clearly shows that since 1918 the complainant has abandoned all efforts to comply with the statute. The wisdom of this statute is solely within the province of the Legislature. The constitutionality of

that part of the statute which prescribes the candle power to be furnished is not attacked by complainant. Other large companies in this vicinity have attempted substantially to comply with said statute, and there is no testimony to controvert the fact that it is possible to make gas and comply with the requirement that the Legislature prescribed after due deliberation and consideration of voluminous evidence relating to this important part of the service.

In *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, the penalties for violation of the candle power statute were held to be unconstitutional, due to their being cumulative, and accordingly it would have been futile to prosecute this company. The complainant has taken advantage of this decision, on the assumption that it could not be punished by the imposition of fines. It can, however, feel the weight of the law at this time by having this Court decide that it has taken advantage of its position as a monopoly deliberately to impose upon its customers. Having come into a court of equity it should be required to do equity before any relief is granted.

POINT IV.

Unaccounted-for Gas.

An unreasonable amount of the unnecessarily expensive gas made by complainant is subsequently lost or unaccounted for.

The complainant loses almost one-fifth of its product in the distribution process, and, moreover, does not improve its methods notwithstanding one serious judicial attack made upon this loss over a year ago. Suppose that any industrial or mercantile plant lost 17½ per cent. of its product before it reached the consumer. Suppose, further, it lost 15 per cent. which the Court fixes as a reasonable amount to lose. What would be the result to the manufacturer? Seventeen or fifteen per cent. would have to be added to the price to the consumer in order to save the concern from bankruptcy. Good business practice does not increase prices to this extent to cover loss, but seeks to eliminate the loss. Where did the Court below obtain the basis of fact to make the findings? This cannot be ascertained from the record, except from two loose statements of engineers. These statements explain nothing. Shall the consumer stand an increase in price to cover this loss in order to justify the slipshod management of the complainant?

The practice of this company was condemned in the opinion of Mr. Justice GREENBAUM, in the prior suit (110 Misc., 204). He said:

> "It may be assumed that a certain percentage of this unaccounted-for gas is likely to exist in every gas factory, however efficiently managed, but that does not explain whether such a large percentage of unaccounted-for gas as is here shown is usual in well-managed gas factories. It was in-

cumbent upon the plaintiff to establish that its business was conducted efficiently and with due regard to proper economies. The expert witness, however, refrained from giving testimony as to what the percentage of unaccounted-for gas was found to be in other gas-making concerns or whether there is a well-recognized average percentage of loss of gas which is unavoidable, nor was he questioned on these points. The plaintiff has therefore failed to meet the burden of showing that its percentage of unaccounted-for gas is not excessive.

The circumstances, too, that in 1916 the ratio of lost gas was 12.69 per cent. of the entire output, and 1918 the ratio had increased to 18 per cent., is an added fact indicating the importance of showing with some reasonable degree of certainty whether such an increased loss could not have been avoided by the exercise of care and efficient management. The failure to furnish proof as to the specific causes to which the losses were attributable is a circumstance strongly pointing to the fact that the loss is excessive and could have been largely reduced by careful supervision."

After its defeat in the State Court, complainant made no effort to reduce the amount of its unaccounted-for gas, so far as the evidence shows.

The loss of gas is a matter of importance, but the danger to health and to life and limb is of even greater concern and needs to be particularly considered in a rate case from the standpoint of losses from claims and damages. A company that admits over 10 per cent. of the gas it sends out is unaccounted for, condemns itself as negligent and wasteful. The burden is upon it to prove why such excessive losses should be charged against the public. Defendants could not in this case be charged with the duty of digging thousands of test holes, making hundreds of thousands of tests on meters, or examining a large number of dead service ends. These

matters are given careful attention by a well-managed gas company. No reasonably operated gas utility can be found, other than complainant, with nearly 18 per cent. leakage in similar territory to that of the complainant at least so far as our experience goes.

All of the witnesses agreed that this was an excessive amount and the Master allowed 11 per cent. which was increased to 15 per cent. by the District Judge.

The evidence shows how inefficient the management was.

Chief among the important elements in the costs as indicated there will be found, by deduction, the cost of making *gas that is lost*. The only way to find the cost to the consumers of this item of expense is by taking the cost of gas made as shown on page 1 of Exhibit 6 (Rec., p. 1033) (.4835) from the cost of gas sold as shown on page 2 (.5920) and thus reach the result (.1085). This 10.85c. per M. applied to 279,274,156 cubic feet, amounts to a loss of $32,254 for the year 1919. We do not say that all of this loss should be eliminated. We do say, however, that the 15 per cent. loss allowed by the Court cannot be substantiated, by the evidence, as the reasonable allowance. In the *Consolidated Gas Company* case the learned judge allowed only 4.1 per cent. for leakage losses. The Master in the present case allows 11 per cent., which the Court increases to 15 per cent. It is impossible to determine how this conclusion was reached. If the Court below believed complainant's territory is different from that of others, this Court should know how much weight was given by Judge Hough to that assumption. It should also know how much of this allowed loss was figured from the testimony of Elsman, who swore that gas was made and blown into the air (after it had been metered) because there was no place to store it (Rec., p. 309). Information should be available to the Court to show the

amount figured for leakage losses because of the fact that the company allowed the gas holder seals to freeze, unbalanced the holder, and thus allowed a lot of gas to be lost.

The witness Klumpp, when testifying for appellee on the matter of leakage, said that some of this might be attributed to "non-register" meters. That means a meter has not registered the amount of gas a consumer has used. It is not due to "sticking valves," as when valves cease to operate the meter will not pass gas. He seems to be unaware of the general practice, covered by Commissions' rules, that where a meter does not register the company is allowed to send an estimated bill, and this excuse that he used for part of the leakage does not hold good (Rec., p. 362).

He figured the greater proportion of gas unaccounted for was due to an underestimate of the amount of gas used for street lighting and paid for by the City of New York. If that is the case then the gas consumers are being indirectly taxed for an expense that should be borne by the people as a whole and not by the gas consumers as a class (Rec., p. 362).

In making comparisons with other territories the witness Miller said that the leakage varies in proportion to the number of services (Rec., p. 385), and we ask the Court to note the testimony of other witnesses to the effect that this particular district has few services as compared with the number of customers, due to one service giving connection to several meters in a large number of apartment buildings. Can you compare Gloversville, N. Y., with Brooklyn? Even Klumpp testified that over ten per cent. unaccounted-for gas would be excessive, and yet the Master found 11 per cent. was reasonable (Rec., p. 365). Klumpp had been testifying considerably about the Minneapolis plant

in comparison with that of complainant; and it is therefore interesting to note that on cross examination *he admitted that the unaccounted-for gas in Minneapolis was practically nil* (Rec., p. 366).

The witness Miller testified that in New York City a lot of the gas goes directly from the holders to the consumers, and that in the territory of the complainant it goes through a long transmission main. He well knew, having been an expert called in the *Consolidated Gas Company* case, and it is in fact very clearly in that record and decision, that gas made for use in the Consolidated system goes into a high-pressure transmission main that is common to all gas companies on the system. His lame explanation on page 390 of the Record impeaches his testimony. The Master thought he saw some very valuable information in the testimony, but it is altogether inaccurate and misleading (Rec., pp. 390-1). This witness, Miller, has long been connected with this company as an "expert," and yet his testimony regarding the places where consumers' meters are set in the apartment houses was entirely broken down by some questions directed to him by Counsel Jackson for the defendants (Rec., p. 391). *His testimony about the "gummy" substance depositing in the meters and making them "tend to go slowly" is not convincing.* The slowing down of the *speed* of the valves would have absolutely nothing to do with the registration of the gas but would merely result in less gas going through per hour (Rec., pp. 394-5).

Judge HAND in the case of *Consolidated Gas Company* v. *Newton* (*ante*) said:

> "The average for the whole system over a period of 13 years during which statistics were given

to the authorities was 5.31 per cent., and unless there are some disturbing factors, this is a valid starting point, which the company must accept. The only disturbing features suggested here are the poorer quality of coal and oil, and I take against the plaintiff any doubt which those factors may raise. I accept the average of 5.31 as a proper allowance for the system as a whole, at least in a rate case * * * I shall therefore take 4.1 per cent. as the proper figure for gas unaccounted for."

The testimony shows (Defts.' Ex. D-1, Rec., p. 1088) that five companies, located in territory similar to that of complainant, reported to the Public Service Commission for each of the years, 1917, 1918 and 1919, a yearly percentage of 8 per cent.

The amount allowed by the Court should therefore be reduced to 8 per cent.

POINT V.

The record in this case discloses a substantial lack of proof on important facts and gross inefficiency in the management of complainant's plant.

Complainant has failed to prove that its business has been run efficiently, honestly, economically and prudently.

The question resolves itself into whether or not the complainant, during the period 1919 to June 30, 1920, on which it relies to prove the statute is confiscatory, possessed reasonably adequate, modern and efficient plant equipment. The testimony shows that complainant's plant is, and has been for many years, poorly designed and inadequately equipped to produce gas economically. It is furthermore shown that this deplorable condition is due to complainant's wilful or fatuous neglect to provide for inevitable expansion of those obvious and ordinary improvements in the art of gas manufacture which substantially decrease the cost of labor and materials used in the production of gas. It has not looked ahead in preparing to meet the demands of the public for good gas at the reasonable price fixed by statute.

The alleged confiscatory nature of a gas rate cannot be established by a mere survey of the operating expenses of the plant for a short period of time; details are required.

In view of the fact that the management and operating policy of complainant's plant is beyond the control of the public—purely a function of the executives of the company—the following questions may be asked:

Can a public utility corporation select any kind of a plant that it has in mind, operate it according to a system that has never been sanctioned in the gas industry, and then come into Court and demand that the public pay the bill?

Can a utility serve only a selected number of customers and refuse service to others, thereby increasing the cost of operating its property?

Can it in equity defy the laws under which it operates and charge more than is allowed for a service less than is prescribed?

All these questions should have been adequately investigated by the Master before the Acts of the Legislature are set aside and before appellee is permitted to collect more than the service is reasonably worth.

Complainant's Exhibit "6" (Rec., p. 1033) purports to show the cost of producing and distributing gas for the year ending December 31, 1919.

The attention of the Court is respectfully directed to the following comments upon said Exhibit:

Complainant reports using *gas oil* for raising steam $.073 per gallon. It reports use of *gas oil* to produce gas in the carburetted water gas system at a cost of $.0646 per gallon. *Gas oil* is used for both purposes and yet the cost per gallon of gas oil is different. Why? Which price is correct?

Complainant reports that it used 22,594.80 tons of generator coal. For purposes of study this should have been narrowed down to the number of pounds used per thousand cubic feet of gas sold. Did the complainant use any coke for generator fuel? The record is silent on the point. The recent decision of Judge HAND in the case of *Consolidated Gas Company* v. *Newton, et al.* (*ante*) is illuminative.

He said at page 248:

> "In 1919 the Seaboard Company was selling it continuously to the plaintiff at six dollars and fifty cents long ton, delivered alongside."

and later at page 249:

> "Mr. Doane had been for many years concerned with the coke market in New York and its environs

and up to 1915 had made more or less continued efforts to obtain a market for so much as the company did not use."

Here we find one New York gas company with coke on its hands that it had produced in its coal gas plants, and which it claimed was going begging at one time; and in 1919 said gas company was able to secure by-product coke from the Seaboard Company at six dollars and fifty cents a long ton alongside its plant. Almost within hailing distance of said gas company appellee was paying eight dollars and forty cents a ton for generator fuel that is admittedly no better than that which the Consolidated Gas Co. alleged it could not sell. The generator fuel used by appellee was worse for this purpose than the by-product coke that the Seaboard Company sold during 1919 at one dollar and eighty-five cents a ton less than the complainant paid for its generator fuel. In 1919, 22,594.80 tons were used. The complainant could have saved about $41,800, on this transaction alone, if the complainant's engineering department had been concerned in economizing, rather than being concerned, which it is, in making the statutory rate at which it sells gas appear to be confiscatory. Was the Master justified in reporting that the prices and amounts paid for and quantities used of generator fuel were reasonable and necessary?

Boiler Fuel. The testimony shows (Rec., pp. 301, 879) that two of the five machines were taken down for repairs in September, 1919, and were not put into use until January, 1920, thus leaving only three machines to take care of the maximum demand, and these remaining three machines had not been cleaned or repaired since June, 1919, although the usual practice is to have them cleaned and repaired after being run for 1,000 gas-making hours.

The allowance for boiler fuel is excessive. Complain-

ant's own witness Klumpp admitted that 18.8 pounds was high (Rec., p. 353). The testimony of Mr. Merrifield shows that the reason for the excessive use of coal was due to the foul condition of the water-gas machines (Rec., pp. 875-6) and that this condition could have been remedied between July and November of 1919; some of the machines could have been re-checkered, as there was no necessity of keeping all five machines in use during that time (Rec., p. 879).

The usual practice in all well-regulated gas plants is to make all repairs during the off season, so as to be prepared for the winter demand.

Residuals. In the manufacture of water gas there is produced a residual oil to the extent of 15 per cent. of gas oil used. This complainant used, according to Exhibit "6," 5,375,887 gallons of gas oil and should therefore have had at its disposal 806,383 gallons of tar oil. It used 749,369 gallons under the boilers and charged production cost at the rate of .064 per gallon. The average selling price of water gas tar in 1919 was not more than 4 cents per gallon. To balance this cost of production, there was a credit for said residual tar, 765,312 gallons at .064 per gallon. *How can the loss of 57,016 gallons of tar be explained?*

Before leaving this matter of residuals, it is pertinent to inquire what became of the products of gas condensation, in the form of light oil recovered at the plant or drip oil collected from the mains? The complainant sets up very boldly, on Exhibit "6" (Rec., p. 1033), the matter of "condensation," possibly thinking it a good round-sounding word to explain away some of the enormous loss of 279,274,156 cubic feet of gas in 1919. There should be available drip oil from condensation to the extent of 78,330 gallons, and at only 5 cents per gallon the revenue to the company would be $3,916.50 for the year 1919. *It appears nowhere on Exhibit "6," as a credit to operations*

or addition to revenues. It is also natural to inquire *where on Exhibit "6" is there shown the rent received from the Morse Company that leased a large amount of waterfront property from the complainant.* As shown by the opinion of Mr. Justice GREENBAUM in this case heard in the Supreme Court of the State (*ante*), this land is leased to the Morse Company and it must be of considerable value because it was shown that a certain real estate man got a commission of $2,000 for negotiating the lease. The complainant in fact valued it at $268,137. In that case the Court included the leased land in the rate base so the rentals received are a revenue chargeable into the gas operations.

Gas Oil. Returning to the recorded operating costs, the complainant reported for 1919 the use of 3.43 gallons of gas oil per thousand cubic feet of gas made. The witness Merrifield, who was put on by defendants at the insistence of counsel for plaintiff (Rec., p. 855), testified that in his opinion the company had used close to one gallon of oil per M. ft. in excess of what should have been required for the lamentably low quality gas that was produced (Rec., p. 866). If we assume, to be on the safe side, that .75 of a gallon was used in excess, the saving at .0646 per gallon would have been .04845 per M. cubic feet of gas made, or the amazing sum of $75,903.12 for the year 1919. One can well imagine where that 150,000 gallons of "sludge" came from that the company reported as being such a nuisance when it clogged the machines and the mains at the plant. This was undoubtedly caused by the foul machines in use as testified by Mr. Merrifield.

As to the quantity of oil reported used in making water gas, we propose to show that the records kept by the complainant are not conclusive. Reference should be made to the testimony of Albert J. Gounnod, auditor and assistant secretary to the complainant, who had never

worked directly or indirectly on gas accounts until June, 1918, and at that time he was employed by a public accountant (Rec., p. 116). He testified that:

> "Well, for the quantity for the year the engineer at the works takes an inventory of the oil on hand, he examines these tanks, reads the gauges, takes the inventory at the begininng of the year; and we receive the bills showing the amount that was purchased. This amount purchased is delivered at our works, and receipt is sent up showing that that amount was received. To the inventory at the beginning of the year we add the purchases during the year and from that we subtract the amount of oil as shown by the inventory on the last day of the year or for the beginning of the first day of the succeeding year, *and that will give us the amount of oil that was actually* used in the manufacture of gas" (Rec., p. 123.)

Even the witness himself refuted this method later, as he showed that all the oil purported to have been received is not charged to the gas oil account. Some of the oil is used under the boiler (Rec., p. 126). In criticizing the method explained above, it may first be said that the witness knew only in a general way that a referee certified that the oil delivered was according to the amount shown on the bill. He had no knowledge of how the engineer measured the oil in the tanks and in fact did not know, even approximately, how large the tanks were. We submit that the mere certificate of some third party to the effect that certain quantities of oil had been received does not prove that it was used in the manufacture of gas. This company reports the loss of very large quantities of gas. May it not be that it also loses a great deal of oil? If that is so, should the consumers be made to stand the expense? The record shows that the reported use of gas oil in the year 1919 was away over what it should have been in a reasonably well-managed company, and we re-

spectfully suggest that the company must prove to the satisfaction of the Court that it not only bought the oil but that it used it legitimately in the production of gas.

Labor. The witness Gounnod testified that he determines to what account labor is to be charged. He issues instructions to the men who are to do the work (Rec., p. 145). The witness admitted that it is absolutely important to distribute the labor as between operating expense and capital account, and in view of his statement that he determines what account the labor is to be charged to we assert that the system used by complainant is incorrect, because the auditor cannot possibly tell just what kind of work every man has done each day. There is no proof in the record that all labor capital costs are charged to the proper account and not to operating expenses.

Materials. The plan in use of taking material out of stores and showing this has been done by a receipt given by the man who gets the material is no proof that the material was actually used on the particular job that said laborer assigns it to. We claim there should be a check made of the material taken out of stores, with the amount estimated to be required when the "extension and improvement requisition" is made out (Rec., p. 147). There is no proof that any kind of check is made. All the company does is to inventory the stores and supplies each year to see what difference there is between the perpetual inventory and the inspectional inventory, but this in no way proves that all material charged out of stores went correctly to operating expenses or capital account (Rec., p. 149).

Books of Account. So far as concerns the books themselves, the witness admitted that the complainant does not include therein certain accounts prescribed by the "Uniform System of Accounts," as, for instance, "Store and Stable Expense" and "General Amortization."

The latter is one of the most important items to be

considered by the Court, because the Commission has laid out this particular amortization account in such a way that it ties in with the repair costs which are charged directly into operating expenses. The Court has been given absolutely no information about the justice of the repair accounts and cannot positively tell if they have been charged with renewals and replacements. If they have, then the additional sum of one cent per thousand that the company claims in its operating expense is entirely unnecessary.

The Master appeared to believe this point was not material, but it was brought to his attention very plainly by Mr. Chambers, for the defendant Newton (Rec., pp. 151, 152). The charge for "plant withdrawn from service" is arbitrarily made at one cent per thousand feet, although there is no such account presented (Rec., p. 152) and no proof that any plant retired from service has not been charged into repairs and maintenance accounts (Rec., p. 152). *The witness put that charge of $12,872.46 on the books of the company for the year 1919 because he was told to do so by the executives of the company* (Rec., p. 153). *There is evidence from the complainant that indicates very clearly the extent to which renewals and replacements are charged directly to operating expenses, Gounnod* testifying regarding repairs to boilers, in connection with the expense of $14,329.05 in 1919 as against $3,895.08 in 1918 and $3,375.27 in 1917 (Rec., p. 220), that "the expense of that is borne within the period where the replacements of boiler tubes was made necessary" (Rec., p. 221).

Referring further to Gounnod's testimony, it is perfectly evident that there is *no real record kept of the amount of tar produced in making the gas* (Rec., p. 158). It is furthermore shown by this witness that extensions and betterments to the water gas machines in 1919 were charged to operating expenses, at least in part (Rec., p.

221). Complainant claims that it actually measures everything that goes into the production of gas, making check inventories every month. *We find, however, that it estimates the amount of tar* made at so much per thousand cubic feet. The Master drew attention to the smaller percentage of tar made in 1920 than in 1919, and the witness Gounnod explained that they found in 1920 this tar was unusable to the extent of 150,000 gallons (Rec., p. 228). That being the case, and it being evident that the 150,000 gallons of "sludge" was not in the tanks at all but was forcibly extracted from the yard piping, how is it that the monthly inventory did not reveal this fact long before the company had it brought to its attention through the choking of the piping system?

General Economy of Plant Operation. Reflecting further on the cost of operations is the admitted fact that the company is operating hand-fired boilers for which it has to purchase a special kind of coal (Rec., p. 289). It was admitted by Gounnod that when the automatic stokers on certain other boilers broke down, the company had to increase its boiler room force by 18 men (Rec., p. 229). It naturally follows that by continuing in use obsolete boilers that do not have stokers attached, this complainant is incurring a greater labor expense than is necessary. In regard to the quality of the gas, we wish to call the attention of the Court to the testimony of Elsman for complainant, particularly at page 303. He shows a great increase in the consumption of gas although there was practically no increase in the number of consumers. This could be caused by two very important delinquencies on the part of the complainant, one being the low quality of the gas and the other being the deficiency of pressure at the consumers' appliances. In 1915, there were 28,925 consumers who used 765,691,400 feet of gas, or an average of about 26,470 feet, whereas in 1919 there were 37,884 consumers who used 1,226,312,-

600 feet, or an average of about 32,370 feet (Rec., p. 304). *The evidence is conclusive that the complainant overtaxed its production plant during the year 1919. It did not have enough gas to go around, so it refused to take on new consumers and at the same time it diluted the gas it sent to those customers it deigned to serve* (Rec., p. 305). *It is also apparent from this that the cost of operation was abnormal.* You cannot work a plant in the way indicated and get normal results. It follows that the negligence of the complainant in keeping up its plant facilities is not to be charged to the consumers.

It will also be noticed from the testimony that it was not until the year 1918 that the company condescended to try and save some money in its boiler house operations by putting in a limited number of automatic stokers. It now has 4 hand-fired boilers and 2 with automatic stokers (Rec., p. 306). *Further light is thrown upon the excessive cost of repairs in 1920 by the testimony of Elsman, who shows that they practically rebuilt three water gas machines and charged all costs to repair account* (Rec., p. 307).

As to further negligence in operation the testimony of Elsman is convincing. *He allowed the water in the holder cups to freeze, which caused an accident to the gas holder, and a lot of gas was lost* (Rec., p. 308). *It is also reasonable to suppose that this occasioned excessive repairs.* Further reasons for the exceedingly bad service given to the consumers are revealed by Elsman's testimony as to the neglect of the company to provide sufficient gas storage (Rec., p. 308). *The lack of holders also caused unnecessary production expense as shown by his statements.* In addition to extra cost to make the gas they blew into the air a lot of gas that had been made (Rec., p. 309).

Gas Making Labor. Having given some examples of the testimony in this case we will again refer to Exhibit

6 and discuss further the reported expenses. On the first page we see the item of "Gas Making Labor." The testimony shows that it is not really all gas making labor but includes boiler labor and a lot of other miscellaneous labor around the plant. There is also testimony that labor of another sort is included with some of the materials. We submit that the Court can form no reasonable judgment from the evidence as to whether or not the amount of gas making or other labor is reasonable. It is very evident from the testimony, as already abstracted, that the operation of the water gas machines was exceedingly bad. Gas machines that should be cleaned every 1,000 hours of operation were allowed to run for *away over 5,000 hours* without being let down. One might just as well expect an automobile to run 5 years without having the carbon removed from the cylinders. Efficiency could not possibly exist in a plant operated as this one was. *Repairs. The evidence all points to the fact that repairs account has been inflated away beyond all reason by more than one cause.* In the first place, a good deal of that undertaken in this plant is known to the industry as *deferred maintenance. Some of it is in the nature of depreciation which should be spread over a number of years. Other parts of it relate solely to improvements and betterments that should be charged to capital account.*

Concerning the inefficiency of this plant we have the evidence of J. B. Klumpp, a witness called for complainant, who swore *that the plant was running at over capacity and was very dirty and inefficient. In the next few words he shows the capacity of the plant had been reduced 25 per cent. because it was in such a dirty condition.* (Rec., p. 336). This witness also testified that although the capacity of the gas manufacturing apparatus was 9,600,000 feet per day and the company had been making as high as 7,000,000 feet per day, the purifying capacity

and condenser area was only sufficient for 5,000,000 feet per day. He also said the transmission main was too small and required more steam for operation than should have been used. He further asserted the gas was going out on the system at too high a temperature and caused deposits in the mains (Rec., p. 341). Can it be wondered at that this complainant reports it is not able to make gas and sell it at the reasonable price fixed by the Legislature.

Klumpp is the man who testified at another time that the complainant could not carry through last winter, and he seemed to be quite anxious to show why his prognostication had not been fulfilled (Rec., p. 339). It is to be remembered that the company has been crying "*Wolf*" for several years and is still doing business.

The witness Klumpp, claiming to be an expert, was asked concerning the boiler fuel shown on Exhibit 6, and stated in reply that 18.8 pounds of "boiler fuel is high compared to what I would consider good, efficient operations" (Rec., p. 353). He evidently did not know what he was talking about because the boiler fuel is away over 18.8 pounds when the tar is taken into consideration, being in fact over 21 pounds per 1,000 feet of gas made. This omission by the witness was apparent to the Master (Rec., pp. 355-6).

The basis for determining whether or not the rate prescribed by statute is confiscatory must include consideration of the management of the property.

In the Master's finding, number 4 (Rec., p. 29), he refers to the capacity of the production plant as it relates to the water gas machines and says that "It is customary in efficiently operated companies manufacturing the same kind of gas as that manufactured by the complainant to estimate actual working capacity as the rated capacity less the capacity of the largest machines. *This is done because efficient management requires* the constant

repairing of machines * * *." It is on record in this case that the management failed to let down the machines once each 600 hours of working effort, but that it allowed the machines to operate continuously for periods longer than 5,000 hours without cleaning the checker bricks, repairing the hot valves, or relining the generator at the clinkering zone. Under the circumstances it is beyond all dispute that the plant has not been efficiently operated or even reasonably well managed.

Under finding 7 (Rec., p. 29) the Master reports that "there has been a steady increase from 1915 to 1920 in the consumption of gas furnished by the complainant requiring complainant to increase its manufacturing and distributing facilities * * *."

We submit that there is not one word in the record to show that the complainant has since 1915 increased the manufacturing facilities. Even if there were evidence to show that additional production units have been installed, we claim that the testimony of complainant's own witnesses is that the production plant is away beyond the capacity of the cleaning machinery and the yard connections. We further assert there has been no increase in such cleaning and handling facilities, and it stands to reason that this manufacturing plant is of no greater capacity and has no facilities in excess of the minimum equipment in its production plant. Does it do any good if you can make 7 million feet of crude gas per day but can only treat it at the rate of 5 million feet per day. If a plant cannot condense the gas that is produced, so as to remove the unstable elements before they get out into the distribution system, will it not result in a stoppage of the gas piping and connections between the machines? The record shows that very thing happened.

Complainant has sufficient production capacity, but the yard connections, condensers, scrubbers, boilers and other auxiliary equipment is away below the production capacity. If complainant had exercised foresight in the design and selection of its plant equipment, making it balance one apart with the other, the present situation would not have been reached. One might just as well say to a man with an obsolete automobile "I will fix you up with a new and more powerful engine, but you must endeavor to run along during the balance of the year on three wheels, because I cannot get you a new wheel in less than 18 months."

The testimony shows that in 1919 the water gas generator produced more gas than the rest of the equipment could handle, and some of the gas had, therefore, to be blown into the air.

The complainant alone is responsible for this condition. The Courts have invariably ruled that the selection of plant is solely within the control of the company, it being unheard of that a regulatory body should substitute its judgment, on the matter of plant design and capacity, for that of the trained executives of the company.

But the courts have never held that gas consumers must bear the burden of excessive costs due to incompetent or inefficient management.

The complainant repeatedly asserts that it has been unable to secure money for extensions. How did it get, and for what useful end did it dispose of $225,000 that was made available to it "after August, 1919," as related by witness Gounnod (Rec., p. 675)? See *Findings of the Master*, No. 39 (Rec., p. 38), in which it is established that the complainant has had 15c. per thousand cubic foot sold since July 1, 1916. Further, the Master in his opinion refers to

an order of August 7, 1918, permitting plaintiff to withdraw funds and to further cease from impounding the 15c. per M. cubic feet. This sum has been expended for improvements and the total amount had by the company in excess of the statutory rate is now approximately $650,000.00. We are confident that if the stockholders' property is in jeopardy, they will take adequate steps to protect it, because they are aware an enormous amount of new business had been ruthlessly turned away and that the company refused to sell any additional quantities of gas, or of appliances on which large profits can be made. Conditions for the consumers cannot be any worse than they now are. The Master reports that since 1915 the sales of gas have increased 100 per cent. (Rec., p. 30). He also reports that the company reduced the price of gas to 95c. per thousand feet on July 1, 1914 (Rec., p. 31). At that time, presumably, it was making huge profits, because it could afford to cut the rate for the gas. It should then have secured new capital. It ought to have laid its plans to build new plant to take care of the greatly increasing demands. It did not do so. It has only itself to blame if it is now in a precarious position.

The testimony of Mr. Merrifield (Rec., pp. 872-3) shows that the Public Service Commission ordered the complainant to make additions to its plant in order that it be in a position to take care of its consumers.

Plant Capacity. Finally in reference to the matter of plant capacity and reasonable production costs we refer to Miller's testimony that the whole plant needs extending and changing, except the water gas generators (Rec., p. 410). Also, other witnesses testified that they needed two new water gas generators. Miller also admitted that all the connections between the gas machines are

too small to take care of even the present capacity of the water gas machines (Rec., p. 405). He then contradicted himself by saying that the plant was all right if they had available some extra holder capacity (Rec., pp. 407-8). He afterwards further contradicted his testimony by saying the boilers are not nearly sufficient for the purpose (Rec., p. 409).

We cannot see how anyone reading the testimony can arrive at any other conclusion than that since this statute was enacted there has been a deliberate attempt upon the part of the management of the company to abnormally and unnecessarily increase its expenses so as to assist it in striking down the statute.

The Public Service Commission, 2nd District of New York, said as follows in Breen *v.* Northern New York Utilities, Inc., P. U. R., 1921, B. 463:

> "The Commission realizes that to a very large extent the policy of the utility as to whether or not salaries shall be liberal or otherwise, and the proportion of the earnings which shall be devoted to various departments of the business, must be left to the judgment of the directors of the company, and that such judgment may not be supplanted by that of the Commission. But unless there is some limit to the application of this doctrine, and it is to be held that the Commission can not criticise expenditure on the ground that it is excessive, the *power to regulate rates is greatly circumscribed.*"

This reasonable limitation of expenditures must, in cases of this kind, be imposed by the courts, or else the power to invalidate legislation, including rates, passes inevitably from the public authorities into the hands of the owners of public utilities.

The operation of a public utility is a business within the scope of government. The company's plant is affected by a public use; the company has, in a qualified sense, taken upon itself a governmental function, and is, therefore, bound in the conduct of its business to scrupulously regard the rights of the public equally with its own.

We earnestly ask the Court to consider these facts. No reward should be bestowed upon negligence. Are the consumers, with hands tied by the monopolistic character of this business, to be bled financially after being inconvenienced and imposed upon by the foisting on them of a spurious article? We have too much faith in our courts to believe so.

POINT VI.

The record shows that the case was disposed of with "undue haste"; the appellants having no opportunity to prepare their defense.

The complainant had its experts ready to testify after many months of preparation.

The witnesses who testified for it were interested witnesses; either employees like Elsman and Gounnod, or men like Miller, of the Bartlett-Hayward Company, and Klumpp, of the United Gas Improvement Company, who are affiliated with it in a business way; while those called by the defendant were disinterested.

The Master would not accept testimony tending to show that it was impossible for the Public Service Commission to make an examination of the complainant's records and give testimony to protect the gas consumers and the public (Rec., p. 901).

The Commission had under its jurisdiction about 100 public utility corporations, and it is manifestly impossible for it to keep in close touch with each one of them, due to its limited staff of engineers and accountants.

The record discloses inordinate celerity in disposing of the case before the Master; it supports a charge that there was undue haste—more than "convenient speed" —in the examination of witnesses, in failure to obtain exhaustive information of the company's financial history and the real facts behind its alleged financial plight. The result is unfair to the public;

We quote in detail from the testimony of Robert H. Mitchell, a witness for the defense (Rec., p. 923) to show lack of opportunity to offer proof in behalf of the defense and further, the Master's misunderstanding of

the scope of the issues in the case at bar (we begin at page 925):

"Q. And you are acquainted with the plaintiff's plant there and the business in a general way, are you not? A. Yes, I have resided in that same ward for over twenty years.

Q. And can you state, in reference to this litigation, how long it would take for you, with say two assistants, to make a complete investigation of the company's accounts for the purpose of informing yourself properly upon litigation of this kind?

Mr. Moran: I object to that.

The Master: Objection sustained.

Mr. Jackson: Exception.

Q. Now, what did you ascertain? Did you ascertain anything in regard to the repairs of the plaintiff?

The Master: He has just stated personally that he has only spent a little part, a small part of a day, as I understand it, considering this question, and gave it up. So I don't suppose that his testimony could possibly be of any assistance to the Court in this case.

* * * * * * *

Q. What steps do you consider necessary and proper in analyzing and ascertaining the reasonableness or unreasonableness of expenditures, and in addition what factors do you take into account in carrying on any such investigation?

The Master: Do you object, Mr. Moran?

Mr. Moran: Oh, I don't see what it has got to do in the record.

The Master: Objection sustained.

Mr. Jackson: Exception.

* * * * * * *

Q. Have you made a detailed examination of the charges to repairs made by the company dur-

ing the years 1918 to 1919 and the first six months of 1920?

The Master: You can answer that.

A. I have not. It is impossible, as I have stated before, to undertake a thorough analysis along the lines of proper procedure, which requires not only analyzing operating expenses, but analyzing the fixed capital accounts to find out that the items included in operating expenses are properly chargeable to operating expense, that they are reasonable and necessary.

Mr. Moran: Just a moment, Mr. Mitchell. I move to strike out the answer, and I object to the question.

The Master: I will let him state that he has not, and that it is impossible to do it within the day's time that he spent on the case.

* * * * * * *

Mr. Jackson: Now, of course, that is limited—your Honor limits it to the time that he has spent on the case (at page 926).

Q. Was it possible to do that within the time that has been available to prepare this case? A. Absolutely impossible.

Mr. Moran: I object to that.

The Master: Objection sustained. There is no evidence before the Court as to how much time there was available to prepare for this case.

Q. May I ask you, how long it would take to make such examination?

Mr. Moran: Objected to on all the grounds, and I ask the Court to admonish the counsel to cease to take any time of the Court and counsel in this matter.

The Master: Oh, I will let him state that, from such an examination as he has made.

A. To properly conduct an examination of the operating expenses, and correspondingly and concurrently to carry on investigation of the fixed capital expenditures for the years 1918 and 1919, and the six months of 1920, would take three engineers approximately four months working continuously.

The Master: You have had just about that time since this case was brought (at page 927).

* * * * * * *

The Witness: Well, your Honor, if I may be permitted to state that we have been under undue pressure, with the limited appropriation and with fifteen cases pending in the courts involving gas rate litigations, and in addition before the Commission—Long Island Railroad rate case, the Manhattan & Queens Traction Corporation——

The Master: Well, I do not think you need to go.

The Witness: And several other railway and lighting matters within the city.

* * * * * * *

The Witness: I am not discussing the question of the rate base. These are elements involving the question of whether operating expenses——

Mr. Jackson: I think, if the Master please——

The Master: Just a minute. I insist upon being allowed to ask any question I please.

Mr. Jackson: I object to the witness being stopped, either by counsel or the Master, before he can answer the question.

The Master: Your statement then, when you said you have to analyze capital account, would be unnecessary in this case, wouldn't it?

The Witness: Except to the extent to find out and ascertain whether there had been an inflation in operating expenses and a corre-

sponding deflation in fixed capital, due to the company charging into operating expenses items of cost of physical property which were properly allocatable to the other class (at page 928).

The Master: Well, you could examine that by looking into your operating expense, you don't have to go into capital expense. You would not object if they charged into capital expenses operating expenses, would you?

The Witness: Well, your Honor, you do not find right on the face of the records of the company. A value is given showing repairs to an account. In order to properly analyze that money value, it is necessary to identify the property represented by that expenditure, which requires——

The Master: Well, I am not going into that.

The Witness: Which requires going back through this system of records. This is just a general line, following the records right back to the original source, consulting the men that were on the ground when the construction work was performed, and ascertaining if that particular work was done and whether it is put under a name that it should not be put under, like repairing mains when it is constructing new mains.

The Master: I am not going into the question of whether there has been adequate time to prepare this case any further (at page 928).

* * * * * * *

Mr. Jackson: Is your Honor going to exclude all other considerations than the fact that he said it should take four months? Did your Honor also consider that it would take two engineers with him, and that there are 18 rate cases pending, and that there is not any such force at the command of the Public Service Commission? Now, that is what I offer.

The Master: I also considered the fact that he included 1918, which is not pertinent to this inquiry.

Q. Then I will limit you, I will ask you a question within, and limit your considerations to the years 1919 and 1920.

The Master: I won't take any further evidence from this witness on this point (at pages 928-929).

* * * * * * *

Mr. Jackson: You have made an investigation regarding this plaintiff in regard to its repairs per cubic foot, as stated upon its schedules in evidence.

A. I have examined the schedules.

Q. And what is the result of that, please?

Mr. Moran: Oh, just a moment now.

Q. What do you find in regard to it?

Mr. Moran: The exhibits speak for themselves.

Mr. Jackson: Oh, they speak part way and part way they are silent. Now I would like to give another opportunity for them to speak through this witness (at page 930).

* * * * * * *

The Witness: I would like to save the time, if there is a question in your mind, and counsel then could proceed with questions along the line, to give you what I thought would enlighten the record on some of these questions. My testimony naturally would be as an engineer who has been identified through all the phases of examination of capital and operating expenditures for the Commission, to find out whether they are properly includable, to find out whether they are deferred repairs or excessive repairs due to the abnormal conditions that prevailed, such as occurred in the gas companies in the

last winter—frozen mains and subway construction requiring relocation of mains, and several other exceptional items that come up. Now, as the result of that, in all this extensive work of many hundreds of million dollars worth of expenditures handled by this Commission, we have collected data showing the repairs per thousand. Some of these companies' expenditures have been closely analyzed, others are not. Official records filed with the Commission show certain costs per thousand cubic feet.

Now, differences in those costs have naturally led us to analyze to see what a figure really means, when you say repairs per thousand, and likewise investment per thousand cubic feet. It has led to conclusions which show that it is unsound to rely on any such data which does not exactly represent a condition than can be used as a basis and taken judicial notice of and subsequently used in a late proceeding. Now, if——

Mr. Moran: Well, just a moment, now, I object (at pages 930-931).

* * * * * * *

Now, Mr. Mitchell, your study of this matter as to the rate per thousand cubic feet, applied to any item that you have in mind—repairs, say, of the plaintiff—showing for the expenses of either 1919 or 1920, which ever one you have in mind, and tell us what the result will be?

The Master: Answer the question.

A. Well, for example, repairs to meters of this company as shown in the annual reports of the Commission for the year 1919, were $22,900.98. In the year 1918 the repairs were $11,595.55, or an increase of approximately 91.5 per cent. in actual dollars. Now, in examining to find out what is a fair amount for repairs for meters, when you eleminate it to a specified period

of time, necessarily calls for an inquiry into the fact. 'Were these meters, meters which were necessarily repaired in that year, or did they include a great number of meters which the company had deferred repairing due to the peculiar economic conditions existing?' If such a fact exists, it produced an abnormal figure in this particular year.

Likewise, the same might be said of any other item. Now, if repairs in this particular year had increased 15 per cent, the corresponding increase in sales might be entirely out of proportion. The year does not represent a normal year unless it is examined and found to be. The cents per thousand cubic feet for repairs is dependent upon the condition of equipment at the beginning of the particular year—whether there has been deferred repairs, whether there has been exceptional repairs which can be explained away due to the two factors, which is increase in labor and material, and also another factor which is the personal efficiency of the working force at the present time.

Briefly, I mean to say simply this: You may find in a particular year, considering the plant operating normally and in a good operating condition and with the company having looked forward with every adequate equipment such as reserve generating equipment, with capacity of mains, capable of carrying ten times the amount of gas, and in good repair—that the sales may increase 30 per cent, and the repairs over the whole system might not increase 10 per cent. And that would be dependent on studying and seeing what the actual conditions are. Likewise, I believe, to draw an analogous case, on the question of fixed capital in the same way—and plant (at page 933).

* * * * * * *

The Witness: Simply as an example. If we found this particular company at this time with per cent. excess generating capacity and with equipment maintained in the best operating condition, and correspondingly the rest of the investment in underground system, mains, services,

meters—with the mains laid out so that they are adequate to take care of the growth for years to come—which is always the effort of a company, to try to anticipate future growth—if a condition like that exists, that there is an investment there which will be able to take care of the company's gas consumers for a number of years with a slight increase in the investment.

So that, whereas today you may find as a matter of fact that the investment is $5 per thousand cubic feet sold, we will say, inside of the next year the sales may increase 25 per cent., but due to the adequacy of the generator equipment and the adequacy and capacity of the mains for carrying a given volume of gas within distribution pressures permitted by this Commission, that for the increase of 25 per cent. in sales there may be 5 per cent. or 10 per cent. or even smaller a corresponding increase in the investment. So, as the ratio is a fluctuating ratio and at one time may mean nothing, and further taking this company right under the present conditions that exist today, any figure predicated upon an investment per thousand cubic feet at this time—and I do not happen to know offhand what was the sales last year, or the generator—but you are, as I understand, from the testimony of previous witnesses, which has been fairly well substantiated all through the record—that you are up to the limit of your rated capacity and almost reaching the point where it is difficult to maintain the adequacy of your service and reliability of your service. Now, you are about to—and if conditions permit you would like to make a big additional investment in generating plant equipment in the next year. What would happen with a growth expenditure of many thousands of dollars to increase your generating capacity, perhaps increase your holder capacity, restrengthen your distribution network of mains, by making extensions, and increasing sizes perhaps in certain sections? A big expenditure like that amounting to a great

> deal of money, incurred in a particular year and with a very slight increase in sales, would be working an injustice to the company if predicated at the present time on an investment per thousand * * *" (at page 934).

Considering the inability of the Public Service Commission to put in serviceable information by reason of lack of available time to examine into the operations of the company now or for any other period, the absence of any direct evidence from the Attorney General's department, and the exclusion by the Master of all evidence relating to operating results prior to 1919, it is respectfully submitted that the record is incomplete.

VII.

For the purpose of making a fair test of the statute, the period found is altogether too brief.

The statute should not be declared confiscatory upon the results obtained in a year and a half of abnormal times, when prices had reached their highest level.

The Period to Which the Master Erroneously Confined the Testimony.

The Master declined to take any testimony as to the operating expenses, etc., for the years prior to 1919 (Defts. Ex. D23b and D24 for Iden., Rec., pp. 1102-1103).

He was undoubtedly influenced by the opinion of Judge HAND in *Consolidated Gas Co.* v. *Newton*, 267 Fed., 231, who predicted that high prices would remain for at least five years.

The Master took evidence over a period of eighteen months, from January 1, 1919, to June 30, 1920.

He said (Finding 28, Rec., p. 36):

> "Present prices are so far as can be judged abnormal and are results of the World War."

The Period Decided by Judge Hough to be the Proper Test.

There are several aspects of Judge HOUGH's decision of what is the proper period for a test, which make it impossible to agree with his conclusions.

The Master said (Finding No. 38, Rec., pp. 37-38):

> "The evidence adduced before me affords no reasonable grounds for expecting that the price of materials or the wages paid to labor in connec-

tion with the production of gas will be reduced during the last few months of 1920 or during the year 1921."

His report was filed on September 22, 1920, and soon thereafter a reversal in trade conditions took place which was unparalleled in history and beyond the wildest dreams of business men in the summer of 1920, when the peak of prices had been reached.

Since the entry of the decree in the instant case, steel plants, textile mills, railroads, express companies and other industries have been readjusting war inflation wages, cutting war inflation production costs, and lowering war inflation prices. These events are of common knowledge; and they are, therefore, matters of which this Court will take judicial notice.

The rights of gas consumers are as sacred as the rights of gas producers. Relief is in sight for all producers. The peak of high prices has been passed. The coal used in the manufacture of gas which a few months ago was sold for ten and twelve dollars a ton has recently been offered at five dollars a ton and as low as two dollars a ton. Prices of food and clothing are coming down. This means that the rate of wages will be reduced, as the purchasing power of the dollar is restored to something like its pre-war state. Yet, in spite of the general tendency downward of all the materials used in the production and distribution of gas, the company is asking for higher rates. Claim is made that it is losing money daily and that no company however strong can sustain such a loss for a considerable period. No one is inclined to dispute this proposition.

In the past it was possible to manufacture and distribute gas for about 45c. per 1000 cu. feet, this left 35c.

to 50 cents to the company to pay overhead expenses and dividends. In the last few years the earnings are claimed to have fallen short of funds enough to pay dividends. A reduction in the dividends would affect the profits of the shareholders; their trustees and directors would prefer that the people should pay a higher price for gas rather than that the profits should be reduced. The defendants who are the trustees of the people should be as solicitous of the interests of the people as the directors are of the interests of their shareholders. When the gas corporation's profits are threatened, the officers of that corporation have no hesitation in commencing suits to declare the statute confiscatory.

This company has suffered no loss by reason of the drop in value of its materials on hand and has not been subject to any of the troubles which confronted the business men of the country in this period of transition back to the pre-war days.

A survey in the interests of fairness should be made of the profits made since the law went into effect and should not be confined to the business of the company during the past year or so of abnormal times. It should go back to the time of the enactment of the statute and should disclose the profits made in the early years when it cost only 45c. per thousand cu. feet to produce gas in order that the earnings of the company may be ascertained for every year from the beginning and so that the probable profits in the future may be computed. Then facts will be available from which an opinion may be drawn concerning the propriety of going to the relief of the company in the present temporary and disappearing crisis. The mere fact that the company claims to be losing money is not sufficient to justify the demand for an

increased rate. If it should appear after investigation that the average profits are reasonable then the demand for the increase will not have a leg to stand on. The statute should not be declared confiscatory so that the extra money should go to the shareholders as dividends to increase the value of their shares and to make profits for speculators in those shares.

As this question has been covered at some length in the briefs submitted by the appellants in the *Consolidated Gas* case we shall not endeavor to burden the Court with a repetition of the argument advanced.

VIII.

The statute is presumed to be constitutional. The burden of proof is on the complainant to prove the contrary beyond a reasonable doubt.

The higher Courts, both State and Federal, have laid the greatest emphasis upon the quality of proof which must be adduced by those who assail a statute as unconstitutional. These decisions have a peculiar aptness when considered in the light of the meagre minimum of testimony presented by complainant.

In *Willcox* v. *Consolidated Gas Co.*, 212, U. S., 19, this Court said at page 41:

> "The rates *must be plainly unreasonable* to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just, both to the owner and the public (citing *San Diego Land and Town Co.* v. *National City*, 174 U. S., 739, 757; *Same* v. *Jasper*, 189 U. S., 439, 442).
>
> *The case must be a clear one* before the Courts ought to be asked to interfere with State legislation upon the subject of rates, especially before there has been any experience of the practical result of such rates. In this case, the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation.
>
> Upon a careful consideration of the case before us, we are of opinion that the complainant has failed to sustain the burden cast upon it of *showing beyond any just or fair doubt* that the acts of the Legislature of the State of New York are in fact confiscatory." (Italics ours.)

Without making extended quotations from the authorities, we may state they uphold the following propositions:

1. The burden of proving that the statute is unconstitutional is upon him who asserts it.

2. This burden must be sustained by evidence which establishes the complainant's case beyond a fair, clear, just, rational or reasonable doubt.

3. The judicial power of declaring laws unconstitutional will not be exercised by this Court except in the clearest cases.

> *Detroit United Railway* v. *Detroit*, 248 U. S., 442;
> *Knoxville* v. *Knoxville Water Co.*, 212 U. S., 8;
> *Minnesota Rate Cases*, 230 U. S., 352, 499;
> *In re Young*, 209 U. S., 123, 165;
> *Atkinson Ry. Co.* v. *U. S.*, 232 U. S., 199, 221;
> *Lincoln Gas Co.* v. *Lincoln*, 223 U. S., 357;
> *Des Moines Gas Co.* v. *Des Moines*, 238 U. S., 153, 163;
> *Railroad Commissioners of Louisiana* v. *Cumberland Tel. & Tel. Co.*, 212 U. S., 423;
> *Shepard* v. *Northern Pacific R. R. Co.*, 184 Fed. Rep., 165;
> *Palatka Water Works Co.* v. *Palatka*, 127 Fed. Rep., 161;
> *Sinking Fund Cases*, 99 U. S., 700, 718;
> *Fletcher* v. *Peck*, 6 Cranch (star page), 128;
> *Montana W. & S. R. Co.* v. *Morley*, 198 Fed. Rep., 991.

In the decision in the case tried in the New York Supreme Court, *Kings County Lighting Co.* v. *Lewis*, *ante*, Mr. Justice GREENBAUM said:

> "It must, however, always be borne in mind that in rate cases the burden is on the plaintiff to establish confiscation beyond doubt."

IX.

Complainant's books of account, erroneously admitted in evidence over defendants' objections and exceptions, are not *prima facie* proof of their contents.

In admitting the books in evidence the Master felt he was bound by the decision of Judge HAND in the *Consolidated Gas* case (*ante*), which was based on the idea that the books had been kept in accordance with the Uniform System of Accounts.

He said (p. 35), "the books * * * have been kept in conformity with said rules and regulations with one exception." * * *.

The appellants pointed out many other respects in which the accounts differed with those prescribed by the Public Service Commission.

The books admitted are transcripts of other books, records and papers, many of which were not proven or even produced.

The witness for complainant admitted that complainant does not keep an account required by the Uniform System of Accounts, and the Master said(Rec., p. 35):

> "Complainant company does not keep an account entitled 'General Amortization—Gas' which is an account required by the Public Service Commission * * *."

Even if all the figures and computations that are on the books of the complainant are correct and exact, the distribution of these figures from the vouchers still remains a matter open to discussion between experts who are sincere in their views as to the proper distribution of them.

The fact that accountants have found the computations, meaning by that the additions, subtractions, divi-

sions, and multiplications entered on the various accounts, to be correct, is no proof that the accounts themselves have not been sophisticated by a wrong distribution of the amounts of the vouchers, or that the cost of gas has not been sophisticated by a subsequent incorrect distribution of these accounts.

It is not possible for a mere accountant, familiar only with figures, and unfamiliar with the practical processes of gas making, to authoritatively determine the distribution of vouchers to accounts, nor, assuming these vouchers to have been properly distributed, to determine the proper accounts, which should go to operating cost, and which should go to capital or investment account.

As this question has been discussed fully in the briefs filed by the appellants in the *Consolidated* case we will not attempt to do so once more.

X.

Rate of Return.

The Court erred in its finding that 8 per cent. was a proper rate of return.

It is well recognized both by the companies in rate regulation cases and by the financial community in ordinary commercial transactions, that what is a fair return upon an investment is not a fixed rule. It depends in great part upon the character of the enterprise. Thus, business men consider a railroad stock earning a certain rate is worth par, while they would demand a much higher return upon the par value of the so-called industries. The risk assumed and the likelihood that the property would continue to earn an adequate profit are always controlling factors of such valuation. This fact is important in the present case.

Utility corporations of all kinds are not subject to the same risk as is the average business for the reason that they are, practically speaking, free from competition and under proper regulation are in fact guaranteed a reasonable return.

It is no reply to assert that a person could not organize a new gas company on a 6 per cent. basis. We are not dealing with new companies just starting out in a small city or endeavoring to compete in a large city.

We are dealing with a company whose rates cannot be arbitrarily reduced below a minimum of profit, and the property has and always will have a value which it would not possess if thrown on a scrap heap.

Although the Court may consider that the company is entitled to earn some return on even that portion of its plant which has been built up out of profits, yet surely the Court would not consider so high a return just upon capi-

tal thus accumulated as upon capital directly contributed by stockholders. This is more likely to be the opinion of the Court if it find, as it surely will, first, that the company has paid good dividends for over twenty years; and, second, that if the gas companies had undertaken to divide much larger profits than they did they probably would have attracted so much public attention as long ago as to have precipitated urgent demands for a reduction in the price of gas.

Section 72 of the Public Service Commissions Law of the State of New York reads in part as follows:

> "* * * with due regard, among other things, to a *reasonable average return* upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

A gas company does not usually exhibit to the public too exorbitant profits on its actual investment by its stockholders. Can it then conceal from the public these profits by putting them in the plant and yet expect the Court to allow it as high a return on the investment as if the cost of the property had been paid for directly by the stockholders?

In general it will be acknowledged by business men that any addition to 6 per cent. interest or profit on moneys invested is because of more than ordinary risks in business. When the percentage on interest or dividend on any given investment drops below 6 per cent. the reduction of interest rates is due to the unusual safety of the investment.

The question of the risks of the business is the controlling factor in the determination of the percentage of divisible profit which may be expected from gas works.

Notwithstanding the fact that accidents and explosions have occurred in other large cities there was pro-

duced no evidence showing any extraordinary danger or any relatively heavy loss on the part of the complainant, which goes to show that gas making on the average when properly conducted is one of the safest and most stable of businesses.

The monopolistic feature of public service corporations, especially in the present case, where a duplication of gas piping would result in an intolerably increased burden upon the City streets, is another important feature to be considered as tending to increase the security of the investment of the complainant company.

This Court has held that public service corporations, as a matter of law, are not entitled to any fixed rate of return. What is a reasonable rate must depend upon the circumstances of each case.

The complainant has paid good dividends since its start, and in addition it has built a considerable portion of its plant out of its earnings. These facts will naturally lead the Court to recognize as reasonable a lower rate of return than if the plant had been entirely constructed out of stock and bond issues.

CONCLUSION.

The judgment should be reversed, the bill of complaint dismissed, and judgment rendered in favor of the appellants, with costs.

Respectfully submitted,
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FILED
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Supreme Court of the United States

October Term, 1921

No. 295

HARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, as District Attorney of Kings County,

Appellants.

against

NGS COUNTY LIGHTING COMPANY,

Respondent.

IEF ON BEHALF OF APPELLANT NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK

CHARLES D. NEWTON,
Attorney-General
of the State of New York
Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for
Appellant Attorney-General,
Capitol, Albany, N. Y.

BER W. CHAMBERS,
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SUPREME COURT OF THE UNITED STATES

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, District Attorney of Kings County,

Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY,

Respondent.

October Term, 1921. No. 295. Brief on behalf of Charles D. Newton, as Attorney-General of the State of New York.

Brief on Behalf of Appellant, Newton.

This is an appeal by the above named appellants from a decree of the United States District Court, for the Southern District of New York (Hon. Charles M. Hough, sitting as District Judge presiding), entered in the office of the clerk of said court on the 19th day of October, 1920, adjudging chapter 125 of the Laws of 1906 and chapter 604 of the Laws of 1916 of the State of New York, confiscatory and unconstitutional, and depriving the respondent of its property, without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States; and furthermore, restraining and enjoining the appellants, public officials of the State of New York, from enforcing the provisions of the aforesaid laws of the State of New York.

The laws herein referred to provided, among other things, that the respondent company shall not charge or receive for gas manufactured, furnished or sold by it in certain portions of the City of New York to private consumers, a sum in excess of 80 cents per thousand cubic feet.

ISSUES IN THE CASE

The issues in this case were, by order dated July 31, 1920, made by Hon. John C. Knox, District Judge of the United States District Court, Southern District of New York, referred to Gordon Auchincloss, Esq., to take proof respecting the issues and to find and report the facts with his conclusions and recommendations. (Pp. 24, 25.)

This being a suit to enjoin the enforcement of a State law as unconstitutional, the findings of the master are not entitled to the weight and consideration usually accorded to them in equity suits, since the validity of the action of a sovereign legislative body is involved. It is the duty of the court in cases of this character to give its own full consideration to the facts as well as the law, regardless of what took place in the courts below.

> *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1.

In the case of the *Consolidated Gas Co.* v. *Newton et al.*, 267 Fed. Rep. 231, the court recognized that this rule obtained. Judge Learned Hand said (p. 259):

> "In these cases the conclusiveness of the master's report does not obtain (*Knoxville Water Co.* v. *Knoxville*, *supra*)."

And again in a supplemental opinion said (p. 274):

> "In the case at bar the reference was not on consent — though without objection — and it was only advisory in any case. In such cases 'the report has no legal sanction, and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master.'"

The order referring the issues to a special master in the instant case was similar to the order of reference in the case of the *Consolidated Gas Co.* v. *Newton et al.*

The trial of the case before the special master began on the 3rd day of August, 1920, and was completed on the 3rd day of September, 1920. The master filed his report and opinion on the 22nd day of September, 1920. The said report and opinion was moved for confirmation before Hon. Charles M. Hough, sitting as United States District Judge, Southern District of New York. Thereafter and on or about the 13th day of October, 1920, Judge Hough filed an opinion confirming the report of the special master herein (pp. 67-75) and thereafter a decree was filed in the office of the clerk of the United States District Court, for the Southern District of New York, as aforesaid, from which this appeal is taken (pp. 75-77).

PRELIMINARY STATEMENT

This action was begun by the service of a subpoena on the appellants on the first day of June, 1920, and the filing of a bill of complaint

to have declared unconstitutional and void as to the respondent, chapter 604 of the laws of 1916, upon the ground that the rate of 80 cents per thousand cubic feet at which gas shall be supplied to private consumers in the City of New York in the 30th and 31st wards thereof in the Borough of Brooklyn, is confiscatory, and that the appellants, public officials should be restrained from in any way enforcing or attempting to enforce the said statute.

There was no allegation that the requirement in the statute as to quality and candle-power of gas served was unconstitutional (p. 1-11).

The answers of the appellants denied all the material allegations of the complaint, and alleged that the respondent has not furnished to its consumers gas of a candle power having the standard of illumination provided by the statute (chapter 125 of the laws of 1906) known as 22 candle-power (pp. 14-23).

The respondent serves about 40,000 individual consumers in the Borough of Brooklyn, City of New York, and furnishes gas for street lighting to about 3,600 street lamps maintained by the City of New York.

The territory served by the respondent company has a present population of about 250,000.

The statute which the respondent seeks to have declared unconstitutional and void (chapter 604 of the laws of 1916) went into effect on July 1, 1916.

Just prior to the time when the statute went into effect and on or about June 22, 1916, respondent started an action in the Supreme Court of the State of New York to have the said statute

declared unconstitutional and restraining the public officials from enforcing the provisions of the said statute. The defendants in that action were the Attorney-General of the State of New York, the Public Service Commission of the State of New York for the First District, and the City of New York. All filed answers denying the material allegations of the complaint. On August 2, 1916, an order was made and filed in that action in the county clerk's office of the City of New York granting the company a temporary injunction and allowing it to charge 95 cents per thousand cubic feet for gas supplied to private consumers from the time the act went into effect, July 1, 1916. This injunction order required respondent to deposit with a trust company the difference between the statutory rate of 80 cents and 95 cents thus allowed. Approximately $610,000 has thus been deposited and no part of this money has been returned to the consumers.

The issues in that case were tried before Mr. Justice Greenbaum at a Special Term of the Supreme Court and an exhaustive and painstaking trial was had. The trial was begun in October, 1918, and concluded in April, 1919. The court handed down an opinion on January 27, 1920 (110 Misc. 204, Record, pp. 1151-1178) and thereafter a motion was made on February 6, 1920, by the plaintiff to reopen the case. This motion was denied by an order of March 29, 1920. The decision of the court contained 111 findings of fact and 20 conclusions of law (pp. 1130-1149).

In the State court action the court found upon competent evidence that in the year 1916, at an

80-cent rate, plaintiff had an income of $153,878.01, or a little over 5 per cent upon the rate base found by the Court of $3,041,259; that in the year 1917 plaintiff had a net income of upward of $152,953.91, which upon the rate base as found by the Court of $3,100,000 would give a return of between 5 per cent and 6 per cent, and that if plaintiff were charged with a substantial sum for unaccounted for leakage, this revenue would be correspondingly increased; and that in the year 1918 the plaintiff had some profit, and with the elimination of objectionable items the income would have been approximately $100,000.

The court further found, that so far as the year 1918 was concerned, the operations of plaintiff show improvidence; that there was no satisfactory proof offered as to the actual amount of coal used; that plaintiff failed to explain the increase in wages of its employees for that year, and the increase in the number of its employees and the hiring of extra help; that its stable expenses were excessive; that the promotion expenses were excessive; that the items for office supplies and expenses were excessive; that a great many items were not satisfactorily explained as necessary and reasonable operating expenses; that the loss in unaccounted for gas was not properly proven; that the gas furnished by plaintiff to its consumers was of a very low candle power and below the standard required by law; that plaintiff has not proven beyond a rational doubt that the 80 cent rate would or could not give a fair return during the year 1918; that plaintiff came into court of equity with unclean hands by furnishing to its consumers in the year 1918 gas of a candle

power of 13.57 instead of 22 candle power, and that the portion of the fiscal year which was as abnormal as was the year 1918 lacked the value of a normal year, in determining the future (pp. 1130-1178).

Judgment was entered in the office of the clerk of the county of New York dismissing the complaint upon the merits, and denying the motion made by the plaintiff to reopen the case. Plaintiff appealed from this order but said appeal has not been heard by the Appellate Division, First Department (pp. 1149-1150).

The appellants in the instant case excepted to substantially all of the findings of the master, and filed assignments of errors covering substantially all of the conclusions and findings in Judge Hough's opinion confirming the report and opinion of the special master and in the final decree from which this appeal is taken (pp. 54-65, 80-92).

The respondent has never operated under the statutory rate complained of. The preliminary injunction in the State court action allowed it to charge 95 per cent per thousand cubic feet from the date when the statute was to have taken effect.

POINT I

Prior adjudication requires a dismissal of the bill of complaint.

The action begun by the respondent in the Supreme Court of the State of New York to have declared unconstitutional chapter 604 of the laws of 1916, sought the same relief as the action in this court.

The defendants were the predecessor in office

of the present appellant Attorney-General of the State of New York, the predecessor in office of the present appellant Lewis Nixon, constituting the Public Service Commission of the State of New York, for the First District; the City of New York was made a party defendant in said action in the State court while in this action the District Attorney of Kings County was made a party defendant. The Corporation Counsel of the City of New York represented the District Attorney of Kings County in this action.

The issues raised by the pleadings are substantially the same. The decision of Mr. Justice Greenbaum contained the following findings, among others:

> "The plaintiff has come into equity with unclean hands in that it has conceded that the candle power of gas furnished to its consumers in 1918 was 13.57 candle power instead of 22 candle power as prescribed by chapter 125 of the laws of 1906, as amended by chapter 604 of the laws of 1916." (6th Conclusion of Law, p. 1148.)

Again:

> "The substantial observance of the requirements of the statute as to the candle power should have been shown by the plaintiff, and *its failure to do so does not entitle it to the favorable consideration of a court of equity*" (p. 1177).

Does this decision of the State courts have any effect? That court had co-ordinate jurisdiction with the United States Courts over the parties and subject-matter here litigated. Since July 1, 1916, the respondent has at all times violated the

statute in question. The pleadings in this case allege a continuance of the violation. (Complaint, paragraphs XV and XXI, pp. 6, 7, 9.) Its general manager says no attempt has been made to comply with the regulations contained in the law since January 1, 1918 (pp. 315-323).

The master during the examination of this witness said:

> "The plaintiff has admitted it never has during this period — I think it has admitted that during this period *it has not produced gas of a candle power required by the statute*" (p. 316).

Can respondent have and entertain a complete disregard for all statutes and laws, and when its conduct has been judicially condemned by a court of competent jurisdiction, is such judgment a nullity and entirely invalid and inoperative, made so by its own determination and decision? It was decided that the respondent was not entitled to equitable relief because of its failure to observe the conditions of the statute, and to conduct itself in that reasonably blameless manner which the rules of equity have prescribed as a condition precedent to the coming in by a suitor. Having been defeated in one court of equity it has prepared a new bill, alleging that at all times it *has continued the same course of conduct, which, the previous judgment declared, prevented relief being given it.* May a corporation be so obdurate as to turn defeat into victory? And shall it, by pleading and proof of *its continuing obstinacy*, lay a foundation for a second action in another court of equity, giving no heed to the decision of a court having full jurisdiction?

The rule that a prior adjudication is conclusive is so well settled that citation of authority is almost unnecessary. It is to the effect that a fact or question which was in issue in a former suit and was there judicially passed upon and determined by a court of competent jurisdiction, is conclusively settled by the judgment therein so far as concerns the party to that action, and persons in privity with them, and cannot be litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction upon the same or a different cause of action.

Missouri v. *Chicago B. & Q. R. Co.*, 241 U. S. 533 (Rate Case) and cases cited by Mr. Chief Justice White in the opinion of the Court.

Williamsburg Saving Bank v. *Solon*, 136 N. Y., 465;

Southern Pacific R. R. Co. v. *U. S.*, 168 U. S. 1.

In the case last cited, Judge Harlan at p. 48, said:

> "Is this position consistent with the settled rule of law as to the conclusiveness, between parties and their privies, of the final determination by a court of competent jurisdiction of matters put in issue by the pleadings?
>
> "The importance of this question, independently of the magnitude of the interests to be affected by our decision, and of the earnest contention of learned counsel, justifies a reference to some of the adjudged cases, showing the grounds upon which this salutary rule rests.
>
> "The general principle announced in

> numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and *even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

It was judicially determined that the respondent was not entitled to equitable relief because it had flagrantly violated the very law which it sought to have declared unconstitutional and void. After such a judicial determination squarely denying it relief in a court of equity, can the respondent seek the equitable aid of a court of concurrent jurisdiction, admitting its continued disregard of the law it seeks to have declared void as it did in its complaint? (pp. 6, 7, 8) Can it hope to have this second court override and disregard the adjudication of the Su-

preme Court of the State of New York, and furthermore, overlook the time-honored equity maxim of "clean hands," all for the purpose of granting relief to a deliberate and flagrant violator of the law of a sovereign State? We do not believe that this court will countenance such practice. The right to equity relief was directly "put in issue and directly determined by a court of competent jurisdiction." The very conditions which led the first court to deny relief were admitted to exist in the complaint to the second judicial tribunal. Paraphrasing the language of the court in *Washington, etc., Packet Co.* v. *Sickles*, 24 How., 333, limits must be imposed upon the faculties for litigation.

A right adjudged by a court of competent jurisdiction under definite conditions such as prevailed in the action in the Supreme Court of the State of New York should be received in evidence "as irrefragable truth" and should be a guarantee of the future efficiency and binding operation of a judgment.

It is true that the judgment of the Supreme Court of the State of New York passed upon the confiscatory nature of the statute for the years 1916, 1917 and 1918 as set forth in the opinion of Judge Hough. But the learned Judge failed to take into consideration that the judgment also provided that the respondent had violated the law assailed, in that, for the year 1918, it furnished to its consumers a gas of 13.57 candle power instead of 22 candle power as provided by statute and that a substantial observance of the statute should have been shown by the respondent, and having failed to do so it was not entitled

to equitable relief. That the same failure to observe the law prevailed in the instant case. The record shows that the average candle power for the six months of 1920 was 13.99, and for the year 1919 was 16.10 (respondent's exhibits 15, 17, p. 1037).

We respectfully submit that the respondent's right to equitable relief, so long as the conditions which moved the State court to deny relief, remained the same, was *res adjudicata*.

In other words, it is the law between the parties here that failure by respondent to furnish gas to its consumers of the statutory quality, prevents it from obtaining relief upon a claim that the rate of return is inadequate.

The fact was established in this action that if did not furnish such gas to its consumers, hence the court below erred in not holding the State court judgment was a bar.

The prior determination required a dismissal of the bill of complaint.

POINT II

The burden of proof is on the respondent to establish beyond a reasonable doubt the unconstitutionality of the statute in question.

It is now settled by an abundance of authority that the burden of proof in suits brought to have a rate statute declared confiscatory, is on the party assailing the statute to establish its contentions beyond a just or fair doubt.

In the case of *Willcox* v. *Consolidated Gas Company*, 212 U. S. 19, the court said (p. 41):

> " * * * The rates must be plainly unreasonable to the extent that their enforce-

ment would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and to the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public." *San Diego Land & Town Company* v. *National City*, 174 U. S., 739, 757; *Same* v. *Jasper*, 189 U. S., 439, 442.

" * * * *The case must be a clear one* before the courts ought to be asked to interfere with state legislation upon the subject of rates. * * *

" Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of *showing beyond any just or fair doubt* that the acts of the legislature of the state of New York are in fact confiscatory" (p. 54).

Chief Justice Waite declared in *Sinking Fund Cases*, 99 U. S. 700, p. 718:

" Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In the case of *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, the court says (p. 163):

" We may premise that the public authority is presumed to have acted fairly, and that the burden of proof is upon the gas company to show that the regulating ordinance has the effect to deprive it of an in-

come equivalent to a fair return upon its property dedicated to public use (*Knoxville* v. *Water Co.*, 212 U. S. 1)."

Trustees of Saratoga Springs v. *Saratoga Gas Co.*, 122 App. Div. 203 (N. Y.)

Ex Parte Young, 209 U. S. 123, 165.

Chicago, Milwaukee & St. Paul R. R. Co. v. *Tompkins*, 176 U. S. 167.

Respondent must establish "*beyond any just or fair doubt*," that the act of the legislature of the State of New York is in fact confiscatory. But as we shall see this rule was not fulfilled. The proof offered by respondent fell short of satisfying the requirement set forth in the cases cited.

Not only did the respondent fail to meet the requirements of the statute in these cases but it was affirmatively established that it never even gave the statutory rate a trial. It started an action to declare the rate confiscatory one week before it was to have gone into effect and obtained a temporary injunction dating back to the day the statute went into effect, and it has never, to the present day, experimented with the rate fixed by the statute.

POINT III

Respondent should experiment with the rate fixed by the statute before it is assailed as confiscatory.

The rate fixed by the statute assailed was 80 cents per thousand cubic feet. It became effective July 1, 1916 (chap. 604, Laws of 1916).

Respondent has not operated under the statutory rate of 80 cents per thousand cubic feet for

gas, but has been charging its consumers 95 cents a thousand cubic feet since the statute went into effect on July 1, 1916. Thus far it has entirely escaped complying with the statute.

The increased use of gas by its present consumers as well as the enormous new business which would result from a lower gas rate is entirely lost sight of by respondent in its various contentions.

In the case of *Railroad Commission* v. *Cumberland Tel. Co.*, 212 U. S. 414, Mr. Justice Peckham said (p. 426):

> "So, also, in furnishing gas at reduced rates, the reduction in the rate would very probably result in increased consumption, not only in increased demands from more consumers, but also an increased consumption by consumers already existing, and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption. In these cases increased profits might be the result of decreased rates."

The respondent, however, asks this court to assume that no more gas will be used and no more consumers will result from an 80-cent than from a 95-cent rate. This is contrary to human experience in all lines of business. Just now drastic reductions in every line of business are being made the world over to stimulate buying by the public. To ask this court to assume, and base confiscation on the assumption, that such will not be the result, and to further ask this court to speculate upon the results of operation at a reduced price without such facts being devel-

oped as the result of experience or even opinion evidence, is extreme and without precedent.

Respondent offered no proof to show what the prospective earnings would be under the 80-cent rate, with the increased consumption resulting from it, so the court was without clear proof as to earnings under the rate, either by an actual test or by opinion evidence.

It is a well-known fact that a gas plant with a large consumption manufactures gas at a lower cost and increased net profits than one with a smaller consumption working only a portion of the day.

The necessity of a practical test under the rate has been pointed out in the case of *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, where it is said (p. 17):

> "Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt."

The same question arose in the case of *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, where this court remarks (p. 41)

> "The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, *especially before there has been any actual experience of the practical result of such rates.* In this case the rates have not been

enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation."

And again at p. 42:

> " * * * a court of equity ought not to interfere by injunction *before a fair trial has been made of continuing the business under that rate*, and thus eliminating as far as is possible, the doubt arising from opinions as opposed to facts."

And again at p. 54:

> It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice.

Thus the *Willcox* case was reversed to permit the company to experiment with the rate.

In the case of *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, the court adhered to the same doctrine. In dismissing the bill the court said:

> " While we agree with the court below that it was right to confirm the master's report and dismiss the bill, we think, in view of the fact that the attack upon the rates was made, before the ordinance went into effect, and *before actual application of the rates could demonstrate whether they were remunerative or not*, that the court should have followed the recommendation of the master and dismissed the bill without prejudice. We think that this is particularly so, in view of

> the fact that ordinarily time alone can satisfactorily demonstrate in a case like this whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate-making cases. The master's suggestion has the support of the judgment of this court in *Knoxville* v. *Water Co.*, and *Willcox* v. *Consoldated Gas Co.*"

This rule was also recognized in the case of *Lincoln Gas & Electric Co.* v. *City of Lincoln*, 250 U. S. 256. In the course of the opinion of Mr. Justice Pitney in that case it was:

> "The application for leave to file a bill of review will be denied, for the following reasons * * * because complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January, 1909, this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case, of subjecting prescribed rates to the test of practical experience before attacking them in the courts" (p. 261).

The rule for which we are contending seems finally settled in these late cases.

The rule is recognized also by the Court of Appeals, for Judge Cardoza said, in the case of *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 97:

> "* * * through repeated decisions, there runs the consistent thought that, in controversies of this order, *experience is the final test*, that the courts must abide their time and let the workings of the law decide * * * * Bills to annul rates have been dis-

> missed 'without prejudice' while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event."

The same thought is expressed in the case of *Bronx Gas and Electric Co.* v. *City of New York*, 195 App. Div. 554; 187 N. Y. Supp. 2, where the court had before it the question as to whether it was proper to order a reference in a gas confiscatory case, and Mr. Justice Page said (p. 556):

> "The acts which it is sought to have declared unconstitutional were passed fifteen and sixteen years ago. *The practical experience of the company under these acts up to January 1st, 1917, taking into consideration the changes that would be occasioned by the increase in the cost of materials and labor will be the determining factors in the case.*"

When a respondent, operating under a rate, alleges confiscation, it must prove such fact "beyond a just and fair doubt." The degree of proof required from a plaintiff not operating under the rate complained of must be conclusive and free from every doubt, or the rate so low and unreasonable that it shocks the conscience of the court.

Mr. Justice Greenbaum correctly states the degree of proof necessary in this case by saying:

> "It is obvious, unless the evidence is conclusive, that confiscation is inevitable under the present law, that it would be mere speculation in the absence of an actual experimentation to find whether the increased business would or would not sufficiently overcome the reduction in price" (p. 1164).

The respondent charged 95 cents per M cubic feet from the date the statute went into effect until March 29, 1920, the date of the final judgment in the State court action. Despite the fact that respondent was unsuccessful in this litigation and its complaint was dismissed, it continued to charge the 95-cent rate without the slightest color of right and in wilful and deliberate disregard of the laws of the State of New York (p. 38).

From the date of final judgment in the State court action March 29, 1920, until the respondent obtained a temporary injunction in the Federal Court in July, 1920, it was charging its private consumers a rate in excess of that provided for by statute in open defiance of law. We respectfully submit that such lawlessness, such a deliberate and persistent course of impudently flaunting the mandates of the State from whom its privilege to operate were derived, hardly entitles a public utility to consideration at the hands of a court of equity. The complaint should have been dismissed on this ground alone.

POINT IV

Respondent came into this court of equity admitting that it had violated the law assailed and with the fact established that it had persistently, flagrantly and deliberately violated the said law in that it had not supplied to its consumers the quality of gas specified in the act in question. For that reason alone the bill of complaint should have been dismissed.

Mr. Justice Greenbaum dismissed the complaint in the action of the State court, correctly stating the time-honored equity maxim by saying "observance of the law is a cardinal principle which

is obligatory upon him who seeks judgment in equity" (p. 1177).

The statute in question provided:

> "The illuminating gas furnished by any such corporations, associaton, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles, of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches." (Chap. 125, Laws 1906, amended by Chap. 604, Laws of 1916.)

Chapter 735 of the Laws of 1905, which is still in force and effect and is known as section 522 of the Greater New York Charter of the City of New York, provided:

> "The said commissioner of water supply, gas and electricity shall appoint inspectors who shall inspect and test the illuminating gas manufactured within the city of New York or furnished or sold to the said city or to any consumer therein. The compensation of said inspectors shall be fixed by the board of estimate and apportionment and paid by the city. The gas manufactured, furnished or sold as aforesaid shall be tested with reference to illuminating power, pressure and

purity in a suitable manner and by proper apparatus at least once each day, and also be tested whenever the said commissioner shall direct. The inspectors shall report under oath the results of their tests to the said commissioner daily and the said commissioners shall file the said reports in his office and the same shall be public records."

Respondent alleged in its bill of complaint, in speaking of the provisions of chapter 604 of the Laws of 1916, which include the provisions of the act above quoted from

> "* * * The plaintiff is not under the duty of obedience to said statute." (Paragraph XXI, p. 9.)

The tests for candle-power were made by the city of New York pursuant to the provisions of law above quoted and show a continued, deliberate and flagrant violation of the statute. The tests made are not challenged and could not be, for they were accurately taken and made pursuant to law. They are found in complainant's exhibits Nos. 15 and 17 (p. 1037).

The master said in his opinion:

> "There is no question but that during the calendar year 1919 and the six months ending June 30, 1920, *complainant did not comply with the statute requiring it to furnish gas of a standard of 22 candle power.* The monthly average of the candle power of the gas produced by the complainant during the calendar year 1919 was as tested by the company, 19.40, and as tested by the city 16.10. During the six months ending June 30, 1920, the monthly average as tested by the com-

pany, was 16.97 and as stated by the city 13.99" (p. 47).

And again in his findings, the master found as follows:

"46. I find that the complainant company has not complied with the provisions of chapter 125 of the laws of 1906 with reference to candle-power (p. 41).

11. Since January 1, 1919, the gas manufactured by complainant averaged monthly in British Thermal Units and candle power as follows (p. 31):

		British thermal units	Tests by city	Candle power tested by company
1919.	January ..	581.42	14.96	18.09
	February..	589.75	15.16	20.80
	March	591.63	15.14	16.77
	April	587.83	14.11	16.41
	May	590.85	16.97	20.07
	June	592.08	17.96	20.44
	July	584.33	18.05	18.96
	August ...	588.21	16.29	20.57
	September..	594.14	16.34	20.13
	October ...	596.32	16.57	20.62
	November..	591.69	15.57	20.69
	December...	600.66	16.12	19.30
Monthly average		590.74	16.10	19.40
1920.	January...	595.15	17.72	19.86
	February..	591.57	14.81	19.01
	March	595.16	16.06	18.92
	April	593.42	15.66	18.24
	May	559.83	11.64	14.47
	June	524.07	8.04	11.20
Monthly average		576.36	13.99	16.97

Gas of a 22 candle power quality contains 620 British Thermal Units or more per cubic foot of gas.

12. On various days in June, 1920, the

candle power of the gas produced by the complainant as tested by the city was as follows :

June 2nd.....	3.59	June 8th.....	3.83
" 3rd.....	4.16	" 16th.....	7.92
" 4th.....	4.11	" 17th.....	6.99
" 5th.....	3.99	" 18th.....	6.70
" 7th.....	3.08	" 19th.....	5.85

Complainant received written notice from the city of New York of the test of its gas made by said city the day after the same was made." (p. 32).

The court said on this score, Judge Hough opinion (p. 71), " This plaintiff has (in the language of Judge Learned Hand's recent decision) *persistently and deliberately disregarded the candle-power requirement.*"

The tests made by the company for candle-power were made at its own plants while the tests made by the city of New York were made at a point removed from the plant in accordance with the provisions of the statute which provide that all tests be made " at least one mile from the distributing holder."

It is readily appreciated and was so found by the master that the candle-power at the works was higher than the candle-power at a mile from the works, where the statute provides the gas shall be of a 22 candle-power. We respectfully submit also that the findings of the master upon candle-power were extremely moderate and the court's attempt to excuse the company's transgressions, entirely unwarranted in view of the testimony, which shows that the respondent did

not even attempt to supply gas of a 22 candle-power from 1918 to date, that its violation of the statute was wilful and deliberate, flagrant and persistent.

The testimony of Mr. Ralph Elsman, then general manager, now the president of the company, is as follows:

> "Q. Do you keep a record of the quality of the gas made? A. We do.
>
> Q. And the exhibits that have been offered here and marked Exhibits 15, 16, 17 and 18, are the records kept at the works of the quality of the gas made in the years 1919 and 1920, showing the British Thermal Units and the candle-power? A. Yes.
>
> Q. What quality of the gas have you endeavored to make in this period? A. In the year 1919 we have endeavored to supply gas on a heat unit basis of 585 b. t. u.'s and we have endeavored to supply the same quality of gas in the year 1920.
>
> Q. How long have you been making b. t. u. gas? A. Since 1918.
>
> Q. You began that in 1918? A. Yes.
>
> Q. What did you make in 1917? A. We made candle-power gas.
>
> Q. At what standard did you attempt to maintain? A. 22 candle power we did maintain.
>
> Q. Did maintain a 22 candle power? A. Yes.
>
> Q. And prior to 1917, from the records of the company, do you know what it was making? A. It was 22 candle power.
>
> Q. Always prior to that? A. Yes.
>
> Q. And you were in charge of the company in 1918, when you changed from candle power to b. t. u. gas? A. I was" (p. 315).

Again:

> "The Witness: It will average between four and a quarter to 4.7 gallons per thousand cubic feet of gas made.
>
> Q. To produce 22 candle power? A. To produce 22 candle power gas. That has been our experience" (p. 317).

And again:

> Q. *Now, then, did you resume the 22 candle power after that? A. No, we did not.*
>
> Q. Well, was there some motive or reason for that? A. Yes, in cutting down — in getting away from the 22 candle power, we went into a heat unit gas (p. 318).

In regard to the amount of oil necessary to produce a 22 candle-power quality of gas, Complainant's Exhibits 6 and 13 (pp. 1033, 1037) disclose the fact that only 3.43 gallons of oil were used in 1919, and 3.6 gallons in 1920 per M cubic feet; *whereas, by the company's own admission it will "average between* 4.25 *to* 4.70 *gallons per M cubic feet" to produce* 22 *candle-power gas.* Does this not truthfully epitomize respondent's sorry attempts to explain away its failure to obey the provisions of the statute? It required too much oil to give the consumers gas of the quality the statute required, and the company therefore gave a poorer quality gas, charged 95 cents for it (statute fixed 80 cents) and then sought the aid of a court of equity, wherein it was denied relief on a previous occasion. The respondent is now charging $1.50 per M cubic feet for gas, or an increase of 87½ per cent above the statutory limit, and giving in return not even the quality of gas

provided for under the legislative 80-cent rate. This through the aid of a court of equity!

The respondent offered as an answer for a violation of the statute in the winter of 1917–1918 (which is covered by the prior adjudication referred to in the preceding point) the fact that New York harbor was frozen over a certain number of days, making the obtaining of oil at its docks difficult for that period. When that excuse was removed the then vice-president and general manager, Mr. Ellsman, undergoing examination says:

> "Q. Now then did you resume 22 candle power after that? A. *No, we did not*" (p. 318).

If the respondent desired to change the standard from candle-power to B. T. U.'s the way was open, because of the amendment to the Public Service Commissions Law, in effect May 14, 1913 (sec. 66, subd. 3).

No application for such an order was made by respondent. We have only to deal here with the 22 candle-power prescribed by the statute. That was the law which respondent was bound to obey. We submit respectfully that the courts may not condemn the wisdom of this 22 candle-power statute. It has been on the statute books since 1906, and until the legislature sees fit to change it the courts certainly are not concerned with its wisdom.

The respondent might readily have availed itself of the amendment to the Public Service Commissions Law above referred to if it desired to change to a British Thermal Unit Standard. But it did not, preferring to deliberately violate the

statute rather than take the simple procedure which the law supplied to change the standard of measurement. Can the respondent disregard with impunity the statute of the State enacted for the protection of the public, and yet be welcomed in a court of equity, as one who has performed in good faith its obligations of duty? If so, courts of equity have abandoned all distinction between a wrongdoer and one who has due regard for the law, in affording extra legal relief.

The legislature has created the respondent. It has a monopoly in the field which it serves in the sale of its product. The legislature, believing its monopolistic powers required scrutiny and curtailment, passed the statute fixing the rates and standards and created a Public Service Commission having regulatory authority and power over the respondent. The respondent arbitrarily and arrogantly set at naught the statute enacted for the protection of the public and declined the statutory invitation to submit its rights and equities with the rights of the consumers to the impartial commission created to change standards, if justice required a change.

The Public Service Commission would have granted it consideration to which it was entitled. The commission was created for that purpose. It was created so that corporations of the kind of the respondent should not take these matters entirely into their own hands. Respondent, by violating the law and refusing to seek the tribunal which could have granted it any relief to which it was entitled, failed in the interim between the judgment in the action in the State court and this action to cleanse its unclean hands; but, on the

contrary, it soiled them to greater extent. For the first eight days of June, 1920, the candle-power of the gas served by this company seeking the active aid of a court of equity *averaged* 3.89 *candle-power*, while the consumers were paying for and entitled under statutory mandate to a gas of 22 candle-power!

And despite all this it invokes the aid of a court of equity having been denied similar relief in a former action!

The question of *scienter* cannot enter into the discussion. The respondent received daily notice of the city's tests showing the continued and flagrant violations and never questioned either the accuracy of the tests or the results obtained.

The case comes within the rule set forth in *Pomeroy* in his excellent works on equity jurisprudence. (3rd ed. sec. 397, vol. 1.) This rule is stated in full in the case of *Michigan Pipe Co. et al.* v. *Fremont Ditch Pipe Line & Reservoir Co.*, 111 Fed. Rep. 284, p. 287:

> "One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law — will refuse to interfere to grant relief to — one who in the matter of transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any other unconscionable act in the transaction which

forms the basis of his suit. (1 Pomeroy, Eq. Jur. secs. 397, 398, 400; *Medicine Co.* v. *Wood*, 108 U. S. 218, 227, 2 Supt. Ct. 436, 27 L. Ed. 706; *Marble Co.* v. *Ripley*, 10 Wall, 339, 357, 10 L. Ed. 955)."

The equity maxim centuries old and invoked in hundreds of cases in our courts, was recently clearly stated in the Circuit Court in an opinion by Judge Rogers in the case of *Carmen* v. *Fox Film Co.*, 269 Fed. Rep. 928. Judge Rogers reviews the maxim at length and the many cases covering the point we are now respectfully urging and says (p. 932):

> "The maxim that one who comes into equity must come with clean hands expresses rather a principle of inaction than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition if he has been guilty, either of *unlawful* or inequitable conduct respecting the subject matter of the litigation."

It would be difficult to conceive of a more "unlawful" or "inequitable" course of conduct "respecting the subject-matter of the litigation" than that of the respondent in this case, and equally difficult to conceive of an application calling for a more potent "active interposition" of a court of equity.

Mr. Justice Greenbaum, in the course of his opinion in this case, in the State court, in speaking of this requirement of the statute said (pp. 1176, 1177)

> "that the quality of gas manufactured during 1918 was far below the candle power prescribed * * *.
>
> It was not denied that the plaintiff regularly received copies of the daily reports of

the official inspections and, moreover, the records of previous years show a substantial compliance with the requirements of law in respect of the candle power of gas sold by plaintiff. In view of these facts and in the absence of any explanation of this seemingly flagrant violation of law, the conclusion seems to be inevitable that the plaintiff's violation of law was deliberate.

The daily tests of gas made by the legal inspectors established that the average quality of gas supplied by the plaintiff during 1918 was an average of 13.57 candles instead of twenty-two candles, which is the minimum prescribed by law. It follows that the consumer was either compelled to consume a greater quantity of gas measured by the ratio of twenty-two to 13.57 at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of 13.57 to twenty-two, for which he paid the price charged for gas of a twenty-two candle power standard.

How can one foretell how much increased business the plaintiff would have had if it had furnished the legal twenty-two candle power instead of the very considerably diminished candle power that it furnished in 1918? The use of gas has been largely extended during the past few years for cooking, heating water, house heating and other purposes. A standard quality of gas should insure a more extensive use of gas. At any rate a fair test under the law cannot be made except by compliance with the law which fixes the standard of quality.

Moreover, it may well be urged that if the plaintiff has knowingly violated the law by selling gas of a standard lower than that fixed by law, it is not entitled to equitable

relief. Observance of the law is a cardinal principle which is obligatory upon him who seeks judgment in equity." (Record, p. 1177.)

Judge Hand, in the *Consolidated Gas Co. of New York* v. *Newton, et al.* case, supra, said:

> " * * * it must, of course, be regarded as the duty imposed upon the complainant while it remains upon the statute book. A persistent and deliberate disregard for it might, I should think, bring this case within that somewhat indefinite rule which turns out of a court of equity a suitor who has himself been unjust in the very matter of which he complains " (267 Fed. Rep. 231, p. 243).

We have shown previously that, without a question of doubt, the disregard of the respondent for the 22-candle-power statute *was persistent and deliberate* within the language of Judge Hand in the above cited case. What could show a more persistent, deliberate and impudent disregard for the statutes of the State of New York than the candle power record for June, 1920? Respondent served its summons and complaint to have the 80 cent gas law declared unconstitutional on the first day of June, 1920, and on the following day, the second day of June, 1920, it supplied its consumers with gas of a candle power of 3.59, cheating its consumers by 18.41 candle power and charging 15 cents above the statutory rate therefor.

We have called the court's attention previously to the candle power of gas supplied on the succeeding days of the month of June. At the cost of repetition we shall submit them again:

June	3rd	4.16
"	4th	4.11
"	5th	3.99
"	7th	3.08
"	8th	3.83
"	16th	7.92
"	17th	6.99
"	18th	6.70
"	19th	5.85

(Complainant's Exhibit 17, p. 1036.)

We need go no further to point out to this court the respondent's utter disregard for the law at a time when, above all other times, it should have been anxious to observe the laws of the State.

The equity maxim of " clean hands " is so well settled and so free from indefiniteness that we shall refrain from any further citation of authorities upon it.

The statute here guaranteed the quality of gas the consumers were to receive. Respondent has more than 38,000 consumers. These consumers have been paying for 22 candle power gas but not receiving it; they were entitled to the quality of the gas prescribed by the statute. The courts surely will not uphold a violation of the law and go so far as to predicate equitable relief upon such a disregard for the law.

While we maintain the heating value is not an issue in the case because the statute makes no mention of it, still gas of 22 candle power has a B. T. U. standard of from 620 to 660 (p. 32). When the Public Service Commission in the district in which this respondent operates made an order permitting gas companies within its juris-

diction to adopt a British Thermal Unit Standard in an opinion by its chairman, Hon. Oscar Straus, fixed 650 B. T. U's as an equivalent of a 22 candle power as far as any equivalent could be fixed. Thus the gas furnished by respondent had neither the illuminating nor heating efficiency which would have resulted from a compliance with the statute.

We have already called the court's attention to the finding that respondent received written notice from the city, daily, of the tests of its gas. We have also called the court's attention to the bill of complaint wherein respondent alleged that it was not under the duty of obedience to said statute, and that the candle power furnished by respondent to its consumers, in June, after this suit was begun, was far below the legal standard and fell as low as 3.08 candle power.

We have also called the court's attention to the fact that the respondent made no attempt to comply with the statute. It also appears that respondent was able, by thus furnishing its consumers with a quality of gas inferior to that prescribed by the statute, to save a vast amount of money through diminution in the use of the oil alone. We submit that there is and there could be no more flagrant violation of the law than this. We have here an exhibition of disregard for the law, *amounting to utter lawlessness on the part of the respondent*. We fail to follow the reasoning of the learned Judge that the company by such conduct "has not thereby injured anyone." It was obtaining money from 40,000 consumers *illegally* and in *violation of law*, being paid for a certain quality of gas which it was knowingly

and deliberately failing to furnish. To use a harsh word its consumers were being "cheated." We earnestly believe that a great injury was done a great many people over a long continued period.

If it should be said that the Attorney-General or the Public Service Commission should have taken steps to stop the flagrant violation of the statute as to quality, we point out that in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, p. 53, this court held that while the 22 candle power provision was valid, the penalty imposed was unconstitutional.

Here is the place to mete out punishment for violation, on respondent's part, of the statute. It is a mild punishment indeed which simply denies respondent relief in the present suit.

POINT V

The consumer should not be charged with the unreasonable, excessive and unwarranted loss of gas allowed by the court and master as "unaccounted for" gas.

The master allowed 11 per cent of the total gas made as "unaccounted for" gas. (Opinion VI and Findings 17 and 19, p. 34.) The court increased this amount to 15 per cent (p. 75). Complainant's exhibit 6 (p. 1033) for the year 1919, shows 17.83 per cent of gas made to be "unaccounted for." All the witnesses on this question agreed that this item was excessive.

In view of the other evidence in this case showing gross inefficiency of the respondent's operations (Point X this brief), we believe that the same inefficiency is reflected in this item of excessive "unaccounted for."

It is conceded that in the operation of gas plants a certain amount of gas disappears and is called "unaccounted for gas." Various reasons are assigned for its loss, such as condensation, leaks, slow meters, and the like. The perplexing question is what percentage is reasonable in the case of each company. It is impossible to determine what the loss will be in advance of its disappearance. One year it may be surprisingly large, and the next comparatively small. There is no question, however, but that a cold severe winter, such as the winter of 1917-1918, affects the condensation of the gas and causes a greater loss than usual; and on the other hand, the mild winter of 1920-21, which we have just experienced, will undoubtedly result in a much smaller loss than usual.

Efficient management will reduce this loss; on the other hand, carelessness and inattention on the part of the company is a cause for increasing it.

Respondent has the largest percentage for unaccounted for gas of any company operating in the metropolitan district. Its alleged "unaccounted for" is twice as large as the company operated by respondent's own witness, John B. Klumpp in Syracuse.

A probable reason for the company's very excessive "unaccounted for" may be found in counsel's brief recently filed in the Appellate Court in the State court action. Inadvertently, perhaps, counsel said:

> "Street lamps are not equipped with meters, the amount consumed being esti-

> mated. In the witness's experience there has always been a material loss in street lamps, using more gas than is actually paid for." (Plaintiff's brief, p. 60.)

If it be true a certain amount of gas is actually delivered to the city but not paid for, and is made a part of unaccounted for gas and charged against the private consumers, then it is not just to the consumer, and in this case it would be improper to charge them with it.

The extreme cold winters of 1917-1918, and again in 1919-1920, were not fairly normal winters upon which to base "unaccounted for gas." On the contrary, they were very abnormal, one being the most severe in forty years. A cold, severe winter materially affects the operating expenses of a gas plant, in many ways, namely, increased unaccounted for gas, larger consumption of generator fuel, larger consumption of boiler fuel, increased repairs to mains, services, and meters, increased stable expense, attending to the unusual calls for assistance from consumers having trouble with appliances, and a lower efficiency of labor.

While all these occur to some extent during a normal winter, they are aggravated during such an abnormal winter as 1917-1918.

In the instant case, respondent made no attempt to explain the unusual loss called unaccounted for gas. It labored under the mistaken theory of law that a mere submission of figures showing the difference between its gas sold and gas paid for would affirmatively establish its "unaccounted." Such a theory is manifestly

erroneous, particularly when the difference is so excessive as to call for independent explanations as it was in the instant case. The burden of *proving* the act assailed as confiscatory is *always upon the one assailing the statute* to establish beyond a reasonable doubt and does not shift with a mere presentation of figures which upon their very face are unusual and contrary to the established experience of the gas business.

Judge Hough, in his opinion, considered 15 per cent loss as proper, basing his judgment upon such average loss as is experienced by suburban or small town companies.

The record in the case, however, has no proof that any such companies are comparable with the respondent, and consequently such a conclusion has no evidence to support it.

Considering the converse of the proposition, would it be fair and just to apply the enormous loss of unaccounted for gas of this respondent, with its conceded loss and leakage from street lamps, to suburban or small town companies? Certainly not, unless the companies have a large number of street lamps, the consumption per mile of main, soil, age and state of repair and location of distribution system, local temperatures and conditions, and many other factors are comparable with respondent.

The best evidence of what an efficient management can reasonably show in localities under conditions most nearly identical with those of the respondent would seem to be found in the showing of the Flatbush Gas Company, the Newtown Gas Company, the Woodhaven Gas Light Company, the Richmond Hill Gas Company, the

Queens Gas Light Company and the Jamaica Gas Light Company. The territories served by these companies are more sparsely populated, large customers more conspicuously absent, service pipes run greater distances and its consumers are of a class that require more excessive metering than in the case of the respondent company; yet these six companies each have reported to the Public Service Commission, First District, a yearly percentage for unaccounted for gas of 8 per cent for each of the years, 1917, 1918 and 1919. (Defts. Ex. D1, p. 1088.) These companies are near neighbors of the respondent, all being located on Long Island and have mains and services in practically the same kind of soil and serve similar residential districts.

Mr. Justice Greenbaum rightly decided that the respondent in the State court action failed to show that such enormous loss was reasonable or justifiable.

He said:

> "There is another matter which merits serious consideration and which applies not only to 1916, but also to 1917 and 1918. The gas manufactured in 1916 amounted to 1,070,266,000 cubic feet. The gas sold during the year was 934,406,000 cubic feet. It thus appears that at least 135,860,000 M cubic feet of gas are unaccounted for. At the rate of thirty-six cents per M cubic feet, which plaintiff itself assumes was the cost of gas to it during that year, this loss would represent nearly $50,000. The lost or unaccounted for gas in 1917 was about 185,322,000 M cubic feet, which, according to plaintiff's figure of thirty-seven cents a cubic foot during that

year would amount to $68,569.14. The gas unaccounted for in 1918, about 230,240,000 M cubic feet for that year, would represent $108,212,180. That ratio of loss for 1916 was 12.69 per cent; for 1917, 15.03 per cent, and for 1918 upwards of eighteen per cent.

"The only explanation for this unaccounted for gas was given by plaintiff's expert, who merely stated generally that a loss of gas is found in all gas plants and that it was due to various causes, such as errors in the station meter, defects in consumers' meters which average low, loss due to the contraction of the gas between the temperature at the station meter and the temperature where it is normally measured, stealing of gas, breaks in mains and leakages in connections. It may be assumed that a certain percentage of this unaccounted for gas is likely to exist in every gas factory, however efficiently managed, *but that does not explain whether such a large percentage of unaccounted for gas as is here shown is usual in well managed gas factories.* It was incumbent upon the plaintiff to establish that its business was conducted efficiently and with due regard to proper economies. The expert witness, however refrained from giving testimony as to what the percentage of unaccounted for gas was found to be in other gas-making concerns or whether there is a well recognized average percentage of loss of gas which is unavoidable, nor was he questioned on these points. *The plaintiff has therefore failed to meet the burden of showing that its percentage of unaccounted for gas is not excessive*" (pp. 1169, 1170).

The court, in the case of *Consolidated Gas Co.* v. *Newton, et al.*, 267 Fed. Rep. 231, discussed at

some length the principles as to unaccounted for gas. In that case the unaccounted for gas claimed by the company was reduced from 7 per cent to 4.1 per cent. The court said (p. 244):

> "Into all the calculations there must come the loss of gas occasioned by condensation, leakage, and perhaps other causes. It becomes necessary to know by how much the plaintiff's production must be taken to be larger than the sales passing through the customers' meters. While it is quite possible to tell this with accuracy for the whole system of which plaintiff is a part, it is impossible to do so for the plaintiff separately, owing to the interchangeable connections of the mains. The loss of the system as a whole has been reported yearly to the Public Service Commission, and represents the difference between the gas made and the sum of gas recorded by customers' and company's consuming meters. The years 1917 and 1918 were abnormally cold and showed an unusual loss of this kind. Obviously, they are not a fair specimen of the normal loss occurring from these causes. The average for the whole system over the period of 13 years during which the statistics were given to the authorities was 5.31 per cent., and, unless there are some disturbing factors, this is a valid starting point, which the company must accept. The only disturbing features suggested here are the poorer quality of coal and oil, and I take against the plaintiff any doubt which those factors may raise. I accept the average of 5.31 as a proper allowance for the system as a whole, at least in a rate case.
>
> The allowance to the company is certainly less than this figure, but how much must re-

main in doubt. The estimated average as reported by the plaintiff to the Public Service Commission for the years 1906–1918, inclusive, was 4.09, and there is a strong presumption that this is correct. Nearly the same result may be reached by another method. It appears to be accepted that 3 per cent. is the proper allowance for all waste but main leakage, which varies inversely with the density of the customers per main mile. Now, taken grossly, the company has about double the density per main mile of the other companies. We may then apportion the sum of 2.31 per cent. for main leakage correctly by dividing the main mileage of the company in half and using the resulting sum for the total mileage. Assuming the total output to be 33 billions, of which the company will furnish 20 billions, the system's loss from main leakage is 762.33 millions, of which the loss attributable to the company is 28 per cent. or over 223 millions. This is about 1.12 per cent., which, with 3 per cent. equals 4.12 per cent. of the gas made, which is surprisingly close to the average reported by the company itself. I shall therefore take 4.1 per cent. as the proper figure for gas unaccounted for" (pp. 244–245).

The unexplained and unusually large amount of unaccounted for gas should not be allowed in this case. It should be reduced to at least 8 per cent of the gas made. The difference between 8 per cent and 17.82 per cent claimed by the company, is 9.82 per cent of the total gas made for the year 1919, amounting to 153,999.53 cubic feet of gas which, multiplied by .4835 alleged cost of gas per thousand cubic feet for the year 1919

(complainant's exhibit 6, p. 1033) amounts to $74,558.77. This amount should be deducted from the cost of production in 1919. Similarly exhibit 13 (p. 1037) shows 14.83 per cent unaccounted for gas for the first six months of 1920. This is in excess of 6.83 per cent over the 8 per cent limit. This would give 64,840 cubic feet as the excess for unaccounted for gas over 8 per cent, which, multiplied by the .6028, the alleged cost of production in 1920, amounts to $39,063.68, which should be deducted from the cost of operation. The two items added together for the year 1919 and the first six months of 1920 amount to $100,622.45. This should be excluded from the cost of operation.

POINT VI

The " fair value " of respondent's property was fixed by stipulation between the parties at $3,300,000. This sum could not properly be augmented by the master for the future needs of the company.

The parties to this suit entered into a stipulation regarding the fair value of respondent's property invested in the gas business for 1919 and 1920. There is no ambiguity about this stipulation. It was clearly understood by the parties and the master. The stipulation is found in a discussion between the master and counsel, as follows:

> " The Master: Gentlemen, you have heard the instructions given me by Judge Knox. Pursuant to those instructions I am ready to receive from you any stipulation you may be prepared to enter into pursuant to the in-

structions received by me from the District Judge.

Mr. Moran: If the defendants' counsel will notify me what amount they will concede as the present fair value of plaintiff's plant and facilities used in the public service I am prepared to act.

Mr. Hill: The Attorney-General, with permission to withdraw the concession I am about to make in the event it is not accepted by the Attorney for the plaintiff, is willing to concede for the purpose of this trial only.

The Master: And pursuant, I understand, to the language of Judge Knox?

Mr. Hill: And pursuant to the language of Judge Knox, that the valuation of plaintiff's plant and facilities used in the public service at all times since January 1, 1919, was and is the sum of $3,300,000. This concession is made solely for the reason that we desire to expedite the trial and for the purpose of the present trial only. It is not to be binding upon any of the parties, particularly upon the Attorney-General except for the purpose of this trial.

The Master: And it is made subject to all of the conditions and provisions of Judge Knox's instructions to me?

Mr. Hill: I include the last suggestion of the Master in my reply.

Mr. Jackson: I will make the same concessions as stated by Judge Hill for the defendant represented by me, with the conditions that all the parties to this case request the court in answering the decree herein to insert therein any necessary or suitable provision protecting the parties from the further or other use or binding effect of this stipulation as to the value of

the plant and facilities in any other action or proceeding.

Mr. Moran: The plaintiff claims the present fair value of its plant and facilities used in the public service is in excess of the sum of $6,000,000, as alleged in its complaint; but in view of the necessities of the situation and the fact that a full valuation is perhaps not necessary or needed for a decision upon the legal questions involved, it accepts the concessions as to value in lieu of calling witnesses to establish the value, provided that it will be agreed here and now that if and when it may hereafter in this or any other cause, action or proceeding before this court or any other tribunal, board, commission or body, be necessary to determine the validity of chapter 604 of the laws of 1916, or any other statute, rule or regulation establishing or purporting to establish the rate or price of gas furnished or sold in the territory served by the plaintiff, the parties to this action and their successors shall be free to establish the value of the plant and property used in the public service in all respects as though this concession and acceptance had not been made" (p. 610).

In a few words this stipulation provided that for the purpose of this case the fair value of respondent's property used and useful in making and distributing gas is the sum of $3,300,000. By the making of the stipulation the door was closed in this case so far as any other valuation was concerned. There was no misunderstanding or ambiguity about this stipulation. It was thoroughly understood by the parties and the court. The master reiterated from time to time the substance of the stipulation.

"I am so determined to keep out of the findings of this case all consideration of capital investment, so that it cannot influence the court in any way except as it may be presented to it through the stipulation which you have entered into" (p. 742).

"You will remember that as soon as questions were asked respecting the capitalization and bonded indebtedness of this company, I at once stated that I wished further instructions from the District Court before going into that question, before permitting questions to be asked respecting them. The District Court instructed me that if a stipulation as to the rate base was presented, my duty was then to receive and ascertain the expenses of the company in the manufacture of gas and a fair rate of return on money borrowed, or a fair rate of return rather on the investment which was stipulated had been made in the company, and that if a rate base was not stipulated that I would then proceed with the case in the regular course" (p. 749).

The master recognized the binding effect of this stipulation in his opinion (p. 44). He says in subdivision II:

"The Rate Base.

The hearings were very much shortened by the stipulation entered into by complainant and the defendants Nixon and Newton that the valuation of complainant's plant and facilities used in the public service at all times since January 1, 1919, was and now is the sum of $3,300,000.

* * * * * * *

The rate base having been stipulated, I excluded such testimony as was offered relat-

> ing to the capital account of complainant except such as was directed to prove that items charged to expense should have been charged to capital" (p. 44).

Yet the master allowed $1,600,000, in addition to the stipulated sum of $3,300,000 as the "fair value" in finding 42 (p. 39), and in his opinion, subdivision X (p. 51).

The court properly excluded this additional sum commenting upon this item as follows (p. 72):

> "The master's finding here complained of is regarded as immaterial; yet for the sake or form the exception is sustained in so far as the master held that the sum of $1,600,000 'should be added to the stipulated value of complainant's plant used in the public service,— for the purposes of this case.' The stipulation was that the existing plant was worth at least a certain amount of money and it went no further. I do not think that it was necessary or proper for the master to add anything to or take away from this valuation which, however, seems to me to have no other function under the whole evidence than to put it beyond the bounds of present argument that plaintiff has an actually existing investment of at least $3,300,000, now worth that sum, and all engaged in making gas."

We think we have shown sufficient to establish that so far as this case is concerned the fair value of respondent's property was $3,300,000. The stipulation having been made, the master was without power to add to or detract from that sum. The amount which he has added — $1,600,000 — is not in being, had not been contracted for and if

the respondent undertook to erect the additional units in the future, the evidence shows that the work could not be completed in more than a year and a half. To charge the present consumers and the consumers of 1919 with this additional amount to the fair value of its property which had been agreed upon by the parties was clearly error on the part of the master. To show the vital effect of this additional property added to the stipulated amount by the master, the computation shows that it amounts to $0.1132 per M cubic feet, which the consumers of 1919 and about the same amount which the consumers of 1920 would have to pay for return upon the property which is not in being, and not even contracted for.

If the question was open — which it was not — the day the respondent erected this additional plant or incurred liability therefor, it would have additional consumers to serve and it would thereby have an increased return so that the unit cost would be cut down accordingly.

All this could have been readily shown had the question been in the case and had it been litigated, but we submit that it was extraneous to the question before the master and that he was without authority to deal with it in any phase whatever.

To substantiate the entire fairness of the stipulated figure of $3,300,000, we respectfully call the court's attention to the finding of Mr. Justice Greenbaum in *Kings County Lighting Co.* v. *Lewis*, *supra*, in this respect. He found the fair value of this company's property for the year 1916, to be $3,041,259, and for the year 1917, $3,100,000 (pp. 1145, 1149).

While the appellants appreciate that their ex-

ception to the $1,600,000 item was sustained, yet the court held that the master's finding in this respect was immaterial. It is because we feel that his findings were vitally material that we have raised the point in this brief. The master, in what is styled "Recapitulation" (p. 53) allowed $144,000 for the year 1919 as the cost of investment for extensions, improvements, etc., on this $1,600,000, and $72,000 for the first six months of 1920. If these costs, together with the others, set forth in this brief, are excluded, it will be found that the *statute assailed is in no wise confiscatory.*

POINT VII

The statute in question should not be declared confiscatory merely upon the financial returns obtained in one or two abnormal years disregarding profits in all prior years.

The respondent seeks to destroy the act of the legislature here in question by showing the financial results for the year 1919 and the first six months of 1920. This period was probably the most abnormal and characterized by the most unnatural and excessive price levels during the past generation. No more economically abnormal period could have been found had the respondent deliberately set out to seek the most extraordinary period of high prices in its entire corporate existence.

The appellants contend that in order to determine the validity of the statute a reasonable normal period should have been selected. The court should have had the benefit of the past experiences of the respondent during normal, stable conditions so that a fair judgment could be formed of the future. The period selected is no more an

indication of the possible future experiences of this company than was the war-time plight of battle-scarred France an indication of its future. The great war created most unusual and extraordinary conditions; but the war-time economic irregularities were as ephemeral as the actual physical destruction.

It is perhaps unnecessary to refer to events occurring in the year 1919 and beginning of 1920 to refresh the mind of the court upon the facts showing the abnormalities of the period following the World War and the economic exhaustion caused by it. Chaos existed everywhere, especially in our transportation and labor circles; enormous inflation; gross profiteering; labor disorders; numerous strikes; Government control of coal and other products and fixation of prices were orders of the day.

Prices soared to levels which were almost beyond belief. This was especially true during the year 1919 and the beginning of 1920. Prices then gradually started to decline and this court will surely take judicial notice of the fact that to-day the enormous war-time inflation has largely passed away and we are now approaching normalcy in prices of material and labor. Prices of all commodities that enter into the cost of making and distributing gas have had a severe decline. Gas oil which goes to make up over 50 per cent of the cost of making gas is now selling in New York City at 5–5½ cents a gallon as against 10–12¾ cents a gallon during the abnormal period selected by the respondent to test the constitutionality of the statute.

There is an abundance of evidence in our every

day life, aside from the sworn testimony, that commodity prices are on the downward trend and have been so since the fall of 1920, and as Judge Hand remarked in *Consolidated Gas Co.* v. *Newton et al., supra*:

> "Evidence is not necessary in the face of so patent and obtrusive a fact of daily life."

The price trend of the two well-known mercantile houses of world-wide reputation, Duns and Bradstreets, show in graphic form what every man learns when purchasing commodities for his home. A recent report establishes that the price levels of general commodities have declined 40.7 per cent from the high mark of February 1, 1920. The descent in prices, like their rise, has been the greatest, in the given time, that the world has ever known.

The appellants contend that an average must be taken over a long period of years of experimentation with the statutory rate, and when thus considered, mere temporary abnormal conditions will be found to be covered and taken care of by the rate. Where the abnormal period is prolonged and exists year after year but still bears evidence of not being permanent in character, inquiry should be made to determine what preparations the company has made to combat such an emergency before any relief is granted for the consumers in prior years may have sufficiently insured the company against the emergency.

The Wisconsin Railroad Commission, one of the foremost Public Service Commissions in this country, states the proposition with good reasoning

in the case of *Re Manitowoca Gas Co.*, 19 Wis. R. R. Rep. 832, is as follows:

> "In order to judge of the necessity of an emergency relief in a particular instance, it is necessary to consider what the experience of the utility has been at times when conditions have been normal, and how seriously the changed conditions have affected it. Where a utility has been able to accumulate a proper surplus after meeting the charges entering into the cost of service, including a fair return on the investment, consumers may have been said to have insured the utility against fluctuating conditions of a more or less temporary nature. In such cases, in order that emergency relief may reasonably be granted by the Commission, there would have to be a showing that the emergency alleged was of a more serious nature and the loss incident thereto greater in relation to the total business than would be required to constitute an emergency in the case of a utility which had been operating with little or no margin and above the actual cost of operating."

It is unjust to test the statute fixing gas rates by the operations of any one year, even though that year be a normal one, for many items such as repair to holders, mains, services, gas machines and buildings may be unduly large one year and the next year comparatively small. Some of the repair items are extraordinary and expensive and do not recur in many years.

Judge Trieber, in the case of *Boyle* v. *St. Louis R. R. Co.*, 222 Fed. Rep. 539, sanctions the view urged by us by saying:

> "By adopting the four year period for averaging the earnings and expenses, we are able to get a fairer result *than by merely selecting one year, which may be affected by peculiar conditions then prevailing.* A four year period, when the years are fairly normal, will reflect more accurately the traffic and cost" (p. 557).

If it is right and just to adopt a four-year period "when the years are fairly normal," it is plain that a much longer period must be considered where any of the years are for any reason abnormal, and not a short period during an unusual upheaval of prices.

In the case of *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, where the operations for one fiscal year were considered by the lower court, it was said (p. 15):

> "We think it was error to confine the investigation to, and base the judgment upon that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. *The operations of the preceding fiscal year or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future.*"

The rule thus seems settled that an abnormal period may be considered only for the purpose of signifying what the future is likely to be. It can not be seriously contended that the year 1919 and the beginning of 1920 was a period of any probative value in "foretelling the future."

Mr. Justice Greenbaum, in considering the abnormal year of 1918, followed the reasoning of

this court in the *Knoxville* case, and held that such an abnormal year was valueless upon which to base confiscation. As to its significance in determining the future, he says:

> "The operations of a fiscal year which was as abnormal as was the year 1918, lacked the value of the normal year in determining the future" (p. 1174).

The sudden and precipitous decline in prices show that Mr. Justice Greenbaum was right in concluding that the abnormal year of 1918 was no indication of the future.

Shortly before the decision in this case, the case of *Consolidated Gas Co.* v. *Newton et al*, 267 Fed. Rep. 231, came before Judge Learned Hand for review. He said:

> "The master has taken complete evidence over a period of twenty months, from January first, nineteen hundred and eighteen, to August thirty-first, nineteen hundred and nineteen. Since that time eleven months have passed, during which time there has been no fall in price levels. The record has some evidence of this down to a later day, but of course, not down to the date of this opinion. But evidence is not necessary in the face of so patent and obstrusive a fact of daily life, and it is quite fair to say that the condition which the master found as of August thirty-first, nineteen nineteen, has been aggravated during the succeeding year. The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production, and the 'ratebase' for a future time long enough to call for some judicial action" (p. 236).

The reason for adopting this period as a test of the statute is clearly set forth by the learned judge, for he states:

> "Either the evidence of the last three years is a sufficient basis for a *forecast*, or it is not. If not, ante bellum values should be used merely for lack of any better; if so, the average of the last three years is the proper basis" (p. 234).

Here we have an expression of opinion by the judge that an average over a period of three years is the proper test, where such a period indicates the future.

Again he says:

> "It is quite true that, if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover, this would not be so. Persons who embark their money in such enterprises must take the bitter with the sweet, and the lean years with the fat. Rates, when established, are not intended to make a nice adjustment, to all ensuing conditions; they are too long and costly to fix, especially in court" (p. 234).

It is clear from a careful reading of the decision that the learned judge had the impression, we had entered into a period of a permanent high level of prices, for he says:

> "Several reasons lead me to believe that present price levels are not merely transitory, though I recognize the danger of any prophecy" (p. 234).

Then he proceeds to point out certain reasons which, to his mind, justify his conclusions in this

regard. This decision of Judge Hand is the first in this judicial district where the abnormal years of 1918 and 1919 were taken into consideration in testing the validity of a like statute.

Mr. Justice Greenbaum, in January, 1920, concluded that the abnormal period lacked value for a *forecast;* while Judge Hand, in August of the same year, concluded that the price levels had existed a sufficient length of time for him to *forecast* and arrive at the conclusion that the price levels would continue for some time in the future.

Although this important decision was rendered but a short time ago, conditions to-day are entirely different from what Judge Hand supposed they would be, and entirely contrary to any *forecast* which he could have made from a study of the past.

While Judge Hand was writing his opinion and forecasting from a study of the period, prices had started on a precipitate decline, the equal of which the world has never known. The abnormal period considered by Judge Hand had no significance as to the future, and surely confiscation should not have been based on those years alone.

Had Judge Hand been aware of the impending rapid descent in prices, a different view would undoubtedly have been taken and expressed by him.

The fallaciousness of his prohecy has been established by later events. His decision has been brought before this court for review and the appellants are convinced that this court will have reversed Judge Hand's erroneous forecast before it arrives at a conclusion in the instant case.

The decision of Judge Hough in the instant

case is predicated upon the assumption that the respondent was suffering from capital losses during this short period.

We respectfully contend that the record does not support such a conclusion and that furthermore the company never operated under the statutory rate and could never, therefore, have experienced capital losses thereunder as pointed out previously in this brief. Whether the statute allows an inadequate return or no return whatsoever, we believe is immaterial upon the question of a fair test of the statute. The period of experimentation is not affected by this fact and the proper period is alike in both instances.

Imagine a test for a five-year period with an inadequate return on capital each year, and another five-year period with a deficit for two years, but an average of 8 per cent return for the full five-year period. The court would surely be more inclined to hold the rate confiscatory during the first case, than during the latter.

As Judge Cardoza remarks in the *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y., 89:

> "Fleeting losses may be suffered and yet the balance sheet may show a profit."

On the other hand, substantial profits may be made for a large part of any period and the balance sheet may show a slight deficit. Is it sound to hold that a dearth shown by a balance at the end of one year but not unreasonably prolonged, is confiscation?

Any inquiry covering one or two years is not only unfair, unjust and inadequate, but mani-

festly will lead to an action such as this for every temporary change in prices of labor, materials and supplies. The intent of the legislature was to fix permanent rates, never attempting to fix rates year by year. It did not reduce the rate for gas in the city of New York in the years prior to the World War when this company and the other New York companies were making large profits, or considerably more than a fair return.

Is it reasonable that the large profit in all prior years should be absolutely disregarded and that the legality or illegality of the act should hinge upon the return for 1919 and part of 1920 alone, particularly so when it clearly appears that these were abnormal, unnatural and unusual times.

If the court's finding be correct that the statute should be destroyed upon the returns made in a year or a part of a year during an abnormal period, it would seem that the legislature would be obliged to change the rate from year to year, in order to adjust that rate to the profits shown by the company. The results for any year would not be known to the legislature in time for action to be taken until another year had passed, and by that time the conditions might have been changed. Such a scheme of legislative control is highly impracticable under conditions such as exist in the city of New York. The theory of rate-fixing by the legislature is based on the assumption that a rate will be fixed which will be fair and reasonable under ordinary, natural conditions over a reasonable period. No attempt is made to have the rate meet "temporary abberrations" either upward or downward. The utility must be prepared to accept "the bitter with the sweet," "the lean with the fat."

In the case of *Lincoln Gas & Elec. Co.* v. *City of Lincoln* (decided June 2, 1919, 250 U. S., 256), it appeared that the action was instituted in 1906 before the $1 rate fixed by the city of Lincoln, had been tested. In the trial court the bill was dismissed without prejudice to the commencement of a new action. An appeal was taken to the United States Supreme Court where the decree was reversed and the cause remanded to the District Court with direction to refer it to a master with leave to submit additional evidence (223 U. S., 349). Accordingly, a master was appointed and he made a report in September, 1914, finding that the rate ordinance was not confiscatory. Upon the rehearing before the master he considered a period from 1906 to substantially the time of his report, which was in 1914, approximately eight years. Mr. Justice Pitney, in writing for the United States Supreme Court in that case said (p. 268):

> "Without going into details, we content ourselves with announcing our general conclusion that, having regard to the entire period under investigation, we are unable to say that the Master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912, the net return was close to the line, if not below it; but that in other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test."

The United States Supreme Court dismissed the bill, but without prejudice to the commencement of a new action to restrain the enforcement of

the ordinance in question, if it should result after a practical test of $1 rate since May 1, 1915, that complainant did not obtain a return which was confiscatory.

In the case of *Darnell* v. *Edwards*, 244 U. S., 564, the Supreme Court had under consideration maximum rates on logs fixed by the Mississippi Railroad Commission. The attack upon rates fixed by the Commission was that they were so low as to be confiscatory. In the course of the opinion of the court, Mr. Justice Pitney said (p. 569):

> "It is well established that in a question of rate making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing. Besides this there was affirmative evidence before the District Court to the effect that the rates were reasonable, the evidence for the complainant tending to show that they were nonremunerative, while based upon actual experience in the operation of the road, *yet relates to only a brief period when conditions were abnormal.*"

And in concluding his opinion, he further said:

> "But it is sufficient for the present to say *that the experimental period was too brief* * * * * * *, and conditions during the entire period covered by the testimony have been too abnormal* to enable us to say that the Commission's rates are confiscatory."

The period under consideration in the above case was from September 10, 1913, to March 31, 1914 (18 months), the same as in the instant case.

In the case of *Steenerson* v. *Great Northern*

Railway Co., 72 N. W. Rep., 713, 721, the court said:

> "If the Great Northern Company has made such large profits in the past that it was able to pay over large dividends and still accumulate such large amounts of surplus to invest in its property or to carry along for several years, it should be content to go along with smaller profits in such time of financial stringency as existed in 1894."

Mr. Justice Greenbaum in the prior case (110 Misc., pp. 204, 242), clearly stated the principle for which we are contending (pp. 1173, 1174):

> "It is clear that confiscation may not be predicated upon the operation of the plaintiff for 1916 and 1917. As to the years of 1917 and 1918, it must at the outset be said that those years were abnormal, owing to the war conditions then existing. Notwithstanding this abnormality, the year of 1917 showed a fair return at an eighty-cent rate * * *.
>
> As to the year of 1918, the question that confronts one is whether confiscation should be based upon such a year, even if it be established with reasonable certainty that the plaintiff's income was thereby reduced to a point which concededly would not be ordinarily deemed an adequate return upon the capital invested * * *.
>
> *The operations of a fiscal year which was as abnormal as was the year of 1918, lacked the value of a normal year in determining the future.*
>
> In this connection it will be instructive to study the opinions of the court as to what is meant by fair return and what period of time should be taken into account in determining the fair return and to what extent abnormal conditions may affect the question of the inadequacy of return."

The learned judge then cites numerous cases tending to uphold his position that confiscation cannot be predicated upon a comparatively short abnormal period. If the year 1918 lacked value in determining the future, then certainly the following year, 1919, when price levels reached their peak, lacked such value, to foretell the future.

Professor Fairchild of Yale University, in "The Economic Principles Relating to the Determination of Reasonable Rates as Charged by Public Utilities," says:

> "A reasonable rate should tend normally in the long run to collect the cost of the service, cost being defined to include a fair return on the capital and a fair reward for the labor of the owner in directing the business. This follows from the principles governing competitive rates, which are normally fixed at cost by the action of natural economic laws, whose results must be admitted to be reasonable.
>
> *The foregoing principle holds only for normal conditions and in the long run.* From time to time a reasonable rate may give profits in excess of a normal return on the capital. This occurs in competitive private business and is likewise reasonable and necessary in the business of a public service monopoly, as a reward for assuming the hazards of the business and as an inducement to improvements, superior organization, special zeal on the part of the owner, from all of which the chief benefit ultimately goes to the consuming public. Conversely a reasonable rate may from time to time be temporarily insufficient to cover the cost of the service."

We submit that the period which should be considered here is from 1909 to the time of the trial, or 1909 to 1920.

The master excluded Exhibits D-23, D-23a, D-23b, D-23c, D-23d and D-24, in so far as they disclosed the financial history from and including 1909 (the date when reports began to be filed with the Public Service Commission), to and including 1916. This was error. From them it appears that respondent earned and paid dividends of $860,000 during such period ($120,000 in each of the years 1909 to 1912, both inclusive; $115,000 in 1913; $125,000 in 1914; $120,000 in 1915, and $20,000 in 1916; since that date they have paid no dividends); interest on funded debt from 1909 to 1920, inclusive, $1,733,924.22. Its surplus of $532,362.01 in 1909 has been reduced to $453,872.18 in 1920, such reduction being $78,489.83.

Thus, such exhibits show earnings of $860,000 and $1,733,924.22, less the reduction in surplus of $78,489.83, or $2,515,434.39, applicable to return on investment. The present value of property is stipulated at $3,300,000. This is larger than at any previous time of the history of the company.

A computation, using the above figures, will disclose a return of between *6 per cent and 7 per cent during the entire period from 1909 to 1920, both inclusive.*

This computation gives respondent the marked advantage of an assumption that the value of its property at all times from and including 1909, was the same as it is now. And further, we take

the records of the company for its earnings, including the expenditures which were customary in the years of large earnings. Many of its expenditures would necessarily have to be eliminated or reduced in fixing a fair return on its investment. Under the cases previously cited this Company cannot prevail in this action upon a showing of even a deficit (which we do not admit) during the short period considered, in view of its average return of 6%-7% from 1909–1920.

Moreover, it is pertinent to point out that respondent has been paying dividends during this period upon capital stock of $2,000,000 and interest on bonds amounting to $1,112,000, about which total amount of $3,112,000, Mr. Justice Greenbaum, in his opinion, stated:

> "On July 1, 1904, the plaintiff opened its books with a stated permanent investment of $4,484,936.37. But that figure obviously included the sum of $3,112,500 heretofore discussed made up of $2,000,000, the amount of its capital stock, plus the sum of $1,112,500, the amount of the bonds created at the time of the merger, *both of which represented water and nothing of value entering into the cost of the plant or land.* Deducting $3,112,500 from $4,484,936.37 we have $1,373,436.37, the apparent actual capital on July 1, 1904" (p. 1161).

Findings 1-25 and 31 and 52 of Mr. Justice Greenbaum's decision sustains the above quoted extract of the opinion, which decision, as part of the judgment roll in the prior action, is part of the record in this case (p. 1105).

It has been heretofore pointed out that since 1909 respondent earned and paid dividends of $860,000 and interest on funded debt of $1,733,924.22. It therefore appears that the amount paid in dividends was upon capital stock which was issued for nothing of value and that interest has also been paid upon $1,112,000 of bonds which the learned court, in the prior litigation also found were issued for no valuable consideration.

What a company is entitled to is a reasonable average return upon the fair value of its property dedicated to public use. Section 72 of the Public Service Commissions Law of the State of New York provides, in part, as follows:

> " * * * In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon the proper determination of the question although not set forth in the complaint, and not within the allegations contained therein, *with due regard among other things, to a reasonable average return upon capital actually expended*, and to the necessity of making reservation out of income for surplus and contingencies."

With earnings of at least between six and seven per cent for the period of 1909 to 1920, inclusive, upon the stipulated rate base of $3,300,000, it is submitted that the respondent has earned far more than the reasonable average return upon its capital actually expended and that the statute fixing the 80 cent rate should not be condemned as confiscatory because of one or one and one-half abnormal years.

POINT VIII

There is such a nonjoinder of parties defendant as to make a determination of the confiscatory character of the 1916 statute impossible of determination in this action.

The appellant Newton set up in the answer that the city of New York is a necessary party and this was urged as a ground for the dismissal of the complaint (paragraph XXIV, p. 17).

The legislature has fixed the rate at which respondent may sell gas by two statutes,—chapter 604 of the Laws of 1916 and chapter 736 of the Laws of 1905. One of the statutes is attacked as confiscatory, and the other is not. The two statutes together fix the price of gas sold by this respondent and each must be considered to determine the confiscatory nature of either. If there is a loss on gas sold to the city at 75 cents per M cubic feet under the latter statute, it cannot be considered in this case, for it is not fair to one class of consumers to raise its rates so high that gas may be sold to the city of New York at a rate less than cost. This would require the loss on the sales to the city to be borne by that portion of the residents of the city who are so unfortunate as to live within the area supplied by the respondent. The city of New York should have been made a party defendant and the two statutes aforementioned, the one covering the price to private consumers and the other the price to the City should have been considered together.

The failure to consider the matter in this manner constitutes such a non-joinder of parties defendant as to make a determination of the confiscatory character of the 1916 statute impossible of determination in this action, and should defeat the contention and prayer of the respondent.

POINT IX

The respondent did not sustain the burden of proving that the statute in question was confiscatory. The books of the company and tabulations compiled from them were improperly admitted and did not meet the requirements of proof cast upon the respondent.

The books of account of all descriptions containing the records of the respondent, together with tabulations and summaries prepared therefrom by the accountants of the company were admitted in evidence over the continued objections of the appellants (pp. 167-174, etc.). These summaries make up the basis of respondent's case.

Both the Master and Judge Hough relied upon the decision of Judge Hand in the case of *Consolidated Gas Co.* v. *Newton, et al.* (supra) for authority upon the admissibility and probative value of the books. This decision is now before this Court for review and we feel confident that the erroneous theory of the law relied upon will not meet with the approval of this court. It will not be our purpose in this brief to detail the authorities upon this point again. In our brief in the case of the *Consolidated Gas Company* v. *Newton, et al.* (supra), submitted to this court a short time ago, this question was thoroughly discussed. We shall, however, merely outline our reasons, together with the facts in the instant case upon which we rely.

The Court committed error in admitting respondent's books and tabulations therefrom, because

1. The books were not books of original entry.

2. The books were mere transcripts by clerks who did not make the original entries and who

had no personal knowledge of the facts stated in the original entries, data or reports.

3. The auditor Gonnoud through whom the books were introduced did not keep the books but supervised the bookkeepers, and the persons who kept the books were not produced (p. 234-236).

4. No witness was produced who made the original entries, data or reports from which the books were claimed to have been transcribed.

5. No witness was produced who had personal knowledge as to the facts set forth in the books (pp. 220-222).

6. There was no evidence that the original data or reports from which the book entries were claimed to have been transcribed were the genuine data or reports of the persons purported to have made them.

7. There was no evidence that the original data or reports from which the books were claimed to have been transcribed were true statements of fact.

8. There was no evidence that it was impossible or impracticable to produce as witnesses the persons who kept the books, or the persons who had personal knowledge of the facts set forth in the books, or the persons who made the original entries, data or reports from which the books were claimed to have been transcribed, or the persons who knew that such data or reports were genuine.

9. There is a fair inference to be drawn from all the evidence that the books were not kept in the ordinary course of business, but, on the con-

trary, were specially prepared for use upon the trial of the respondent's rate litigations.

10. When the entire fabric of the respondent's claim of right in this action was vitally challenged by the evidence, and the respondent could have produced an original record or report showing the truth or falsity of the challenge, the respondent deliberately failed and refused to produce that record or report; and thus the respondent evidenced the falsity of all its pretenses of candor and good faith; and evidenced its bad faith regarding its original data, records and reports, not only in this particular but also in regard to all of its original data, records and reports from which the books are claimed to have been transcribed; and thus any presumption of correct bookkeeping, of an efficient business management is destroyed (pp. 116–238).

Auditor Gonnoud could not testify *to the facts;* he had knowledge only *of the books.* Yet, the Special Master based his main findings of fact solely upon these books. Is it not apparent that he may understand perfectly the system and know every item of the books, and yet be totally ignorant of the facts? And is it not even more apparent that summaries such as respondent's exhibits which were shown to its experts as bases for their sworn opinions may hide the grossest extravagance and mismanagement? The testimony established that this was exactly the situation.

Underlying data of the books.

At the appellant's request (p. 675 plus) the respondent produced various forms of financial and accounting stationery and sta-

tistical record. The detailed explanation obtained by the cross examination of witness Gonnoud regarding the system and use of some of this data will show clearly the hiatus between the books and the underlying data; that the foundation was readily available and practicable to put in evidence; and that the respondent failed to produce the best evidence. (Deft's. Exhibits D-8 to D-18; p. 1097.)

Not one of the employees of respondent who had first-hand knowledge of the actual facts of the plant operations was produced to testify to the facts and to be subject to cross-examination, forcing any inquiry of the defense to stop at the books (pp. 799-814). The following person or persons could have been called to establish the book entries:

1. The clerk or the head of the department originally making out a requisition for material or supplies.

2. The person or persons in the purchasing department who obtained quotations upon material and supplies and ordered them.

3. The person or persons who saw that material and supplies were received and who checked and certified to the receipt, the storekeeper, the engineer at the works, or other responsible person having actual personal knowledge of the facts.

4. The person or persons who saw the material and supplies being put into use at the plant, and who counted, measured or weighed them, or who were in immediate superintendence of or originally responsible for that work—the storekeeper, the coal weigher, the oil measurer, the engineer at the works, the foreman, and especially the per-

sons who made the original allocations or divisions of the material and supplies between the capital account and the expense account.

5. The person or persons who had immediate charge of labor, the head of the employment bureau, the timekeepers, the paymaster, and especially the persons who made the original allocations or divisions of the time of the employees between the capital account and the expense account.

6. The person or persons who actually made and determined the inventories, monthly and yearly, which took the place of the actual weights, counts and measurements of all material and supplies, through which inventories shortages were made up on the books.

7. The meter readers or the person to whom they first make their reports.

8. The persons who made the original entries from which the books were transcribed.

9. The persons who actually transcribed the books.

The aggregate number of witnesses who thus would be called upon to testify would be much smaller than, at first glance might appear from the above specifications, as many of the functions mentioned are performed by one person.

The period covered was short and recent, 1919 and 1920, and there is no evidence but that all such persons were available.

If the action were between private individuals, there would be no question but a foundation would have to be laid for the books as above outlined.

The action being brought to declare a statute of the State unconstitutional, the result affecting

the whole people and especially a number of consumers equal to the population of a large city, shall the degree of proof required of a monopolistic corporation be relaxed?

The respondent relied for support of the books upon:

a. The check made by the Accountant Hopson, who was employed by the respondent to do that work, for the purpose of testifying upon this trial.

b. The supervisory powers conferred by law upon the defendant Public Service Commission.

The testimony of Mr. Hopson will show the nature of his work; that the check by an employee of the respondent of one month, for the purpose of testifying for it in this action, is absolutely insufficient as a check of a year; that any such check, even for the whole year, would not go far enough below the books to reach the facts as to the truth of the facts appearing upon the books, or as to the efficiency of operation; that such testimony is an insufficient substitute for the fundamental evidence which was available (pp. 238-267, 592-628).

As for the supervising power of the Public Service Commission, such authority does not in any wise lend probative value to any item in the respondent's books of account. Complainant's Ex. 1, (p. 952) "Uniform System of Accounts for Gas Operations," together with an order of the Commission, dated June 20, 1917, prescribes a uniform system or method of bookkeeping. The scope and purpose of this uniform system of ac-

counts is set forth clearly in the fourth paragraph of the aforesaid order, as follows:

> "In prescribing this uniform system or method of keeping accounts, records and books to be observed by such corporations, the Commission is not undertaking that *any item set out in any account will have the Commission's approval either as to amount or character in fixing a rate or authorizing an issue of securities.* The system or method of accounts prescribed is designed to set out the facts in connection with the income, outgo, etc., and the Commission will determine in any proceeding involving the fixing of a rate or authorizing an issue of securities just what consideration shall be given to items in the several accounts" (p. 1023).

There are under the jurisdiction of the Public Service Commission about 100 public utility corporations, all of them keeping complicated books of account.

To intimate that the Public Service Commission should have a staff sufficient to see to it that each one of these great corporations keeps its books in such a way as to accurately indicate its operation, is amazing. The Public Service Commission can prescribe forms of account. It can, to the extent of its appropriations, endeavor to see to it that these accounts are kept by the numerous companies. Even as to that, the failure of a company to keep accounts in the form prescribed would not be excused, by the fact that the Public Service Commission had failed to succeed in any of the penalty provisions of the Public Service Commissions Law, or the District Attorney had failed to put anyone in jail under the

criminal provisions of the law. Corporations do not become innocent because they are not punished for disregard of the law.

But beyond the manner or the form in which the books are to be kept, is the matter of the substance appearing in the books.

The question of the accuracy of the books as well as the question of the necessity of the payments recorded therein, depends upon the multitudinous matters which could not by any human possibility be checked by a regulating body. The honesty and accuracy of every clerk who makes an entry in any book will affect the total result. Can it be expected that the Public Service Commission, must at its peril have an inspector at the elbow of every bookkeeper in every public utility in this great city, to see that every entry he makes is accurately made? Can it be expected that the Public Service Commission must have sufficient men continuously working with the public utility companies, to see that the original entries made, are carried forward accruately in their many subsequent entries until they reach their final resting place, in the general books of account?

The appellants in order to establish this patent truth introduced the testimony of two employees of the Public Service Commission,— Mr. Mitchell, an engineer, and Mr. Howard, an accountant,— to the effect that the Commission had not ascertained, nor could they possibly ascertain nor check either the truth or falsity of the various books, items or the data underlying in these book entries (pp. 900-906, 923-937).

The case of *People ex rel. New York Railways*

Co. v. *Public Service Commission*, 223 N. Y. 373, judicially determines the purpose and scope of the Uniform System of Accounts. The court, by Judge Cuddeback, said (p. 377):

> "Section 52 provides that the public service commissions may establish a system of accounts to be used by railroad corporations or other common carriers, and prescribes the manner in which such accounts shall be kept, and may, after a hearing, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. * * *
>
> Section 52, on which the commission relies, and which relates to the establishment of a system of accounts, *was plainly intended to make the method of accounting by these corporations uniform so that the accounts could be readily comprehended by those required to examine the same*. By establishing a system of accounts the corporations were required to show under particular heads what they had done. *It was not to regulate the management of their finances but to show what the management was*" (p. 378).

The books of the respondent were inadmissible under any rule of law nor does compliance with the Uniform System of Accounts lend any degree of sanctity to the entries therein. On this score we respectfully point out that the very uniform system which the respondent would use to verify its entries was only followed where it suited the convenience of the company. The Master so reports in his opinion as to "General Amortization" (pp. 46, 47), but attempts to excuse this dereliction by saying it was "a variation made

in good faith." By reason of this failure the court has no information as to the justice of repair accounts. The charge of "plant withdrawn from service" is put at one cent per M cubic feet, although there is no such account presented and there is no proof that any plant retired from service has not been charged to repair and maintenance accounts (p. 152).

The respondent was obligated to follow the accounting methods prescribed and not set up its judgment as against the Commission. We submit that its "good faith" in this respect was of the same character as its alleged "Good faith" in supplying a ridiculously low candle power gas and excusing itself with the explanation that it was giving something "just as good."

The trial court in the case of *Kings County Lighting Co.* v. *Newton, et al.* (supra), in the State court action adopted the correct rule, that is, that the burden of proving by clear and convincing evidence, that the statute is confiscatory is upon him who alleges it, and proof of the various book items shall be made from original sources, viz: vouchers, time sheets, daily and monthly work sheets and the other sources from which are taken the journal entries in the books of the company. This is the rule that should have been adopted in the instant case. Failure to compel the respondent to meet this burden of proof warrants, in itself, a reversal of the decree herein.

POINT X

The proof discloses that the respondent's plant was not operated in an efficient and economical manner and that gross inefficiency and mismanagement added greatly to the cost of making and distributing its gas.

The respondent is inadequately equipped and poorly designed. In many respects its equipment is antequated and the well recognized methods of efficient gas manufacture ignored. The record is replete with instances of inefficiency that borders upon deliberate neglect. The appellant Lewis in his brief submitted in the instant case has studiously analyzed the record and pointed out in Point V thereof many examples of such inefficiency and neglect.

Repairs to machinery (pp. 301, 879), use of residuals (p. 1033), improper and wasteful equipment (pp. 336, 341, 353), methods of manufacture that are extravagantly wasteful (pp. 855, 866), use of antequated hand-fired boilers (pp. 229, 289, 304-305), excessive cost of repairs (pp. 306, 307), freezing of water in the holder cups (pp. 308-309), lack of sufficient holder space for storage (p. 309), failure to properly cleanse machinery resulting in reduced production and "deferred maintenance" (p. 336), improper transmission mains, (pp. 340, 341), gas sent out of too high a temperature (p. 341), condensers, scrubbers, boilers and other auxiliary equipment below production capacity (pp. 405-410) are some of the examples of the respondent's inefficiency. We shall refrain from again analyzing the record in respect to these matters, but content ourselves with this query: Shall the respondent's items of cost, necessarily abnormally excessive under conditions of this kind, prevail to declare unconstitutional a legisla-

tive rate? The legislature had in mind, undoubtedly, a reasonably well managed and equipped plant. Are the consumers of this particular district of the city of New York to be deprived of this legislative protection because of the derelictions of the respondent company?

POINT XI

The Court and master erred in not deducting many improper items from respondent's alleged operating costs.

We shall point out seriatim many improper items that should have been excluded from operating costs by the Master and Court.

Coal Shortages — $3,956.88, *for* 1919
$687.13 *for six months*, 1929

The respondent's evidence showed that the coal used in all its operations was actually weighed by the respondent at its works; but that in entering the amounts used upon its books, the weights were disregarded, and so-called "adjustments" were made by which the amounts *as billed* were substituted upon the books for the amounts shown by the actual weights. The pretext for this substitution was a process called a "survey" or "inventory," by means of which fiction the net result at all times was to compute the amount billed as the amount actually used.

As to the item of coal, each of the years 1919 and 1920 showed that the aggregate amounts billed exceeded the amounts as weighed by very substantial amounts. The appellants contend that, in an action of this nature, the proper figures to be taken are those of the actual weights. The respondent tried to show, over the objection of the appellants, that there was a custom to ac-

cept the amounts billed as against the weights. We submit that the recognition of any such custom would open wide a door for fraudulent combination between the dealers in such commodities as coal and oil and gas companies.

The Master considered the aggregates of these shortages to be so small as to impel him, under the maxim *de minimis non curat lex* (Opinion, p. 49), to disregard them. That is to say: The amounts were too small to credit to consumers, but were not too small to credit to the gas company.

The aggregate shortages between the amounts billed and the amounts as weighed during the year 1919 were as follows (pp. 539, 540):

Boiler coal, 369 tons, at $5.034 per ton.	$1,857 55
Anthracite coal, 220.3 tons, at $8.407 per ton	1,852 87
Bituminous coal, 39.9 tons, at $6.177 per ton	246 46
Amount to be deducted	$3,956 88

The aggregate shortages between the amounts billed and the amounts weighed during 1920 were as follows (pp. 539,540):

Barley coal, 216,551 pounds = 96.67 tons, at $4.14	$400 21
Anthracite broken coal, 66,078 pounds = 29.5 tons, at $9.00	266 97
Bituminous, 6,624 pounds = 2.96 tons, at $6.74	19 95
Total amount to be deducted	$687 13

Excess of Boiler Fuel Coal —

$7,049.83 *for* 1919

$14,232.15 *for six months*, 1920

The evidence shows that the average figure for boiler fuel appearing upon Respondent's Exhibit 13 (p. 1037) for the year 1920 of $.0527 per M c. f. made, was excessive by $.015 per M c. f. made (p. 868).

Making this deduction for the year *1920*, would leave the proper figure for this item to be not more than $.0377 per M c. f. made. There is no evidence that the same results would not be equally applicable to the year *1919*.

In fact respondent's witness, Klumpp, admitted that 18.8 pounds of boiler fuel coal for 1919 was "high compared to what I would consider good efficient operations" (p. 353). But because of the addition of "boiler fuel water gas tar" the pounds of boiler fuel used in 1919 totaled 23 pounds, which Klumpp again stated was high (p. 356) although the latter tried to qualify his admissions. Taking, therefore, $.0377 as a fair cost in 1919 for boiler fuel per M c. f. made instead of $.0422, set forth on respondent's Exhibit 6, a difference of $.0045 per M c. f. made; and multiplying $.0045 by the total of M c. f. during 1919 — 1,566,628 M c. f. — amounts to $7,049.83, the amount to be deducted. In addition, a like deduction as in 1919 for boiler fuel of $.015 per M c. f. made (p. 869) Multiplying $.015 by 948,810,000 the total cubic feet made during first six months of 1920, gives *$14,232.15*, the amount to be deducted.

Oil Shortages — $2,313.78 *for* 1919

$902.92 *for six months of* 1920

Respondent's Exhibit 41 (p. 1079) shows an excess of oil billed over the amount delivered during the year 1919, aggregating 35,817 gallons. The appellants make the same contention regarding the oil shortages as we have made hereinbefore regarding the coal shortages. Complainant's Exhibit 6 (p. 1033) shows the average price of oil for the year 1919 to be $.0646 per gallon—which multiplied by 35,817 gallons gives $2,313.78, the amount to be deducted.

Complainant's Exhibit 41 (p. 1079) shows an excess of measurement over amount billed during this period, amounting to 11,329 gallons, so this item will be *credited*. Multiplying 11,329 gallons by $.0797, the average price shown on Complainant's Exhibit 13, will give $902.92, the amount to be deducted.

Excessive Repair Charges—

$33,960.54 *for* 1919

$38,980.51, *for six months*, 1920

Complainant's Exhibit 6, (p. 1033) for the year 1919, shows the item "Repair Labor and Material" to amount to $43,045.68. Page 2 of that Exhibit shows the items "Repair Mains," $3,559.11; "Repairs Services," $2,816.88; "Repairs Meters," $22,900.98; "Repairs Appliances," $227.10; "Repairs General Structures," $669.70; "Repairs Distribution Tools," $160.97—making an aggregate for the "Distribution Repairs" (on said page 2) of $30,334.74—which, added to the above item "Repair Labor and Material" (page 1, Ex. 6), $43,045.68, amounts to a total of repairs for the year 1919 of $73,380.42.

Respondent's Exhibit shows the like aggregate expenditure for repairs for the year *1918* to be $45,206.85, and for the year *1917* to be $37,991.68. Therefore, the figure for 1919 would exceed the figure for 1918 by $28,173.57, and would exceed the figure for the year 1917 by $36,378.74.

The appellants contend that this grossly excessive figure of $73,380.42 is manifestly not an average amount of yearly repairs, such as would be proper to be considered in an action of this nature, but is either deferred repairs or repairs anticipatory of future requirements; and, in either case, should be spread over an appropriate period of years so as to show an ordinary yearly average.

Respondent's witness Elsman told of extraordinary repairs made in 1919 which should have been made in prior years (pp. 306-308).

Defendant's Exhibit for identification D-24 (p. 1103), which the Master erroneously excluded, showed the yearly repairs for the years 1909-1918, both inclusive, and including the amount claimed by the respondent for the year 1919, the yearly average for the period 1909-1919, both inclusive, is *$39,119.88*. We believe that this latter average should be substituted for the extraordinary amount shown by the respondent for 1919, and the difference would leave *$33,960.54 to be deducted*.

The total 1920 repairs shown on Complainant's Exhibit is $60,462.29. For the reasons hereinbefore stated as to the 1919 repairs, we think the Court should take the average repairs for the period 1909 to June 30, 1920, which is $42,963.56

per year, or $21,481.78 for six months. Deducting this latter figure from $60,462.29, leaves $38,980.51 *the amount to be deducted.*

Excessive Unaccounted-for Gas

$74,558.77 for 1919.

$39,063.68 *for six months*, 1920.

This question was fully discussed in Point V of this brief. Any allowance in excess of 8% is unwarranted.

The difference between 17.82 per centum and 8 per centum or 9.83 per centum of the total make of 1,566,628 M. cubic feet of gas, is 153,999.53 M. cubic feet of gas; which multiplied by $.4835 (Respondent's Exhibit 6), cost per M. cubic feet, amounts to $74,558.77, *the amount to be deducted.*

Complainant's Exhibit 13 shows the "unaccounted for" at 14.83 per centum for first six months of 1920, which amount is 6.83% in excess of the 8% — the reasonable allowance for "unaccounted for" gas. Multiplying the figure of 6.83% by 948,810 M. cubic feet made during said six months gives 64,804 M. cubic feet as the excess of "unaccounted for" gas over 8%, which multiplied by $.6028 the cost of production in 1920 amounts to $39,063.68 as the amount deductible.

Auditing Expense — $6,000 *for* 1919.

$3,000 *for six months*, 1920.

Appellant's contend that the item of the yearly amount paid to the accountant or auditor, Mr. Freeman, should be deducted as an extraordinary and unnecessary expense, an expense incurred in preparation for this rate litigation, an expense that is for services in duplication of the services

performed by the regular accountant and auditor, Geunoud. The amount to be deducted was a part of the auditing expense excluded by Finding 59 of Justice Greenbaum upon the recent trial in the State Court, and is *$6,000*.

For the same reasons stated for eliminating Mr. Freeman's salary as auditor or accountant from the 1919 operating expenses, the amount of *$3,000* should be deducted from the 1920 operating expenses.

Loss in Street Lighting —

$6,458.42 *for* 1919.
$4,480.07 *for six months*, 1920

The item shown on respondent's Exhibit 6 (p. 1033) for "Municipal Street Lighting," 49,855,444 cubic feet of gas sold at 75 cents per M., amounting to $37,411.55, is charged to the City of New York upon the basis of 3,500 lamps burning 3,959 hours per lamp per year, and consuming at the rate of 3½ cubic feet of gas per lamp per hour.

This gas is not metered, and the respondent's engineers estimate that each lamp consumes 4½ cubic feet of gas per hour, instead of 3½ cubic feet. Therefore, the city is using 1 cubic foot per lamp per hour more than it pays for, and consequently the private consumers are charged with this excessive amount of the city's use (pp. 511-512). Witness Elsman, the general manager of the respondent, testified:

"Q. You think there is a loss of about a foot an hour?

A. Yes, sir, that is what my estimate is" (p. 762).

Multiplying 3,500 lamps by 3,950 hours burning, gives 13,825,000 lamp hours; which amount multiplied by 4½ cubic feet gives 62,212,500 cubic feet actually consumed by the city. Subtracting from the latter amount the 49,685,444 cubic feet billed to the city, leaves *12,527,006 cubic feet excess charged to private consumers.* Multiplying the said excess cubic feet by $.5235 (respondent's alleged cost of production and distribution per M. gas made in 1919 — respondent's Exhibit 6) gives *the amount to be deducted $6,558.42.*

We have heretofore shown that the company estimates that the city is using 1 cubic foot per lamp per hour more than it pays for, the cost of which excess should not be borne by the private consumers. For the first six months of 1920 the loss on this item would amount to *$1,480.07*, the figure to be deducted.

Uncollectible Bills —

$10,816.48 *for* 1919.

$5,542.13 *for six months*, 1920.

Complainant's Exhibit 6 (p. 1033) sets forth this item at $10,816.48. We submit that this item should have been disallowed in its entirety.

The Transportation Corporations Law of New York State (Section 63) authorizes respondent to require:

> " * * * every person to whom such corporation shall supply gas * * * for lighting any building, room or premises, to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required or proposed to be used, for two calendar months by such

> person and the quantity of gas * * * necessary to supply the same, as security for the payment of the gas * * * or compensation for gas consumed * * * to become due to the corporation, * * * ”

The respondent, unless the deposit was made as required by the above section, might cut off the supply of gas to the consumer, or refuse to serve him.

> Section 65 of the Transportation Corporations Law.

The New York courts have even gone so far as to hold that a gas company may cut off the supply of gas to a consumer who neglects to pay, although he may have made a deposit as security.

> *Hewsey* v. *Queens Borough Gas Co. & Elec. Co.*, 47 Misc. 375.

Here the company is authorized by statute to obtain in advance a deposit to cover gas to be thereafter sold to the consumer. In other words, it may have its money in advance. It is a protection not ordinarily afforded other business. At least with this safeguard the burden was upon respondent of showing that it used more than ordinary diligence in its effort to collect its gas bills, and this ought to appear before any allowance is made for such item.

All that we have here is the inclusion of a sum for uncollectible bills without any competent proof showing diligence on the part of the respondent to collect the amount from its consumers. There is a lack of proof sufficient to warrant the Court in allowing any sum for this item. While, on the contrary, we think, in view of the

statute quoted, and the safeguards surrounding respondent in the sale of its gas, there ought not to be any allowance in a confiscation case for uncollectible gas bills.

Respondent has something better than a cash business. It may obtain its cash in advance and place it on deposit to await the day when it furnishes gas. It may then reimburse itself out of the consumers' money. There ought not to be any loss to the company by failure of a consumer to pay.

The amount to be deducted under this item is therefore $10,816.18. Similarly this item for the first six months of 1920 is $5,542.13 which should be deducted.

Strike-towage — $1,844.37 *for six months*, 1920.

A labor strike in March, 1920, caused respondent to pay a premium on towage for coal, amounting to $1 per ton, or an aggregate amount of $1,844.37, as shown by complainant's Exhibit 27 (p. 1045). That amount should be deducted as entirely unusual expense and disallowable for rate making purposes.

Water gas tar lost — $12,120 *for six months*, 1920.

It was the bookkeeping custom of the respondent to estimate that a given number of gallons of oil would yield a certain amount of tar as a residual. This residual tar was burned as a fuel and credited at the price of gas oil. The heavier oil received at the plant during the early part of 1920 was claimed to have clogged the pipe connections, etc., with an "emulsion," or "sludge" differing from the usual residual of tar, and which

the respondent claims to have thrown away as of no value. The amount of this "sludge" was not measured, but was merely "estimated" by the respondent's engineers who were not produced as witnesses. This "estimate" of 150,000 gallons was deducted upon the books from an amount already entered there in the credit account of the residual tar, the account being called "Residuals Produced — Credit" (pp. 217, 218, 228).

The appellants contend that the evidence regarding this item is very indefinite and uncertain, it being an arbitrary deduction of 150,000 gallons from an entry already established, upon a basis for which no original record or report appeared to have been made, nor any actual measurement taken, nor any evidence thereof by the person or persons who actually estimated that amount.

The great probability was that this residual or "sludge" was far less in amount than 150,000 gallons. When one makes a simple computation, reducing 150,000 gallons to cubic feet, by estimating 1 gallon = 231 cubic inches; 1 cubic foot = 1,728 cubic inches; 7½ gallons = 1 cubic foot; and thereupon computes the cubic space that would be occupied by 150,000 gallons, a clearer idea will be formed of the extreme improbability of any such large amount.

While this material was claimed to have been thrown away at respondent's plant as worthless, respondent's expert witness Klumpp said that he believed it would burn (p. 463).

The 150,000 gallons was deducted from the total residual credit at the aggregate amount of *$12,120*

(p. 217), which amount appellants contend should be also deducted from cost of production in 1920.

Excessive Use of Gas Oil —

$75,000 *for* 1919.

$37,500 *for six months*, 1920.

Witness Merrifield, a gas engineer of 29 years experience, testified that he was the chief gas engineer of the Public Service Commission for the First District. He was at one time plant superintendent for the Consolidated Gas Co. and the Brooklyn Union Gas Co., the two largest companies in the City of New York (pp. 855, 856).

The impartiality of his testimony is readily discernible from a reading of his expert opinion upon various matters he was called on to pass upon (pp. 856–865).

When asked whether the amount of oil used 3.6 gallons per M. cu. ft. was excessive for the quality of the gas manufactured by the respondent company his reply was that "they should have been able to produce a gas of that 535 B. T. U's in approximately *one gallon of oil less per M.*" (p. 867).

Respondent claims to have supplied a gas of 19.40 candle-power and 590.74 B. T. U.'s *tested at the works* in 1919 and 16.97 candle-power and 576.36 B. T. U.'s *tested at the works* for the first six months of 1920. The Master found that a 22 candle-power gas contains *620 B. T. U.'s or more* (p. 32). The statute provides that all tests shall be made one mile from the distributing holder. The Master found that

> "The average of the tests at the works will be higher than the average of the tests more than a mile from the works" (p. 32).

This is very evident. While no B. T. U. tests were made by the city one mile from the holders, yet the difference in the candle-power tests 19.40 at the works — 16.10 one mile distant in 1919, and 16.97 at the works — 13.99 one mile distant in 1920 (p. 32) justifies the conclusion that B. T. U. standard was correspondingly less one mile from the distributing holder and it is entirely fair to assume that the B. T. U.'s therefore did not exceed the 535 figure that Merrifield testified to should have been produced with 2.6 gallons of oil. Computing the saving upon the 3.6 gallons actually used, the conclusion is inevitable that between $75,000-$100,000 was wasted in excessive use of oil for the kind of gas made. The faulty machinery, the inefficiency of the plant, etc., discussed in Point X of this brief probably account for this loss. Correspondingly there was a loss of $37,500 — $50,000 for the first six months of 1920.

We submit a table with the foregoing deductions made from the respondent's own figures on operating expenses for 1919 and the first six months of 1920. The total cost per M of gas to this respondent was, we contend, *only $.7047 for the year 1919 and $.7897 for the first six months of 1920* and the rate of return upon the stipulated rate base of $3,300,000 for *1919 was 9.77%* and for the first six months of 1920 was 4.12%. This is neither confiscation nor capital consumption.

SUMMARY OF OPERATING COSTS WITH DEDUCTIONS CLAIMED BY DEFENDANTS FOR 1919

Calendar year 1919.

Total operating expenses, Taxes and Uncollectible bills.....	$1,121,967 53
Less cost of municipal sales..	37,618 16
Gross cost of gas supplied to commercial consumers	$1,084,349 37

Items appliable as deductions from above costs.

Shortage in delivery of coal...	$3,956 88
Excess of boiler fuel coal used over 3.77 cents per M. cubic feet made	7,049 83
Shortage in delivery of oil.....	2,313 78
Excess over average repairs...	33,960 54
Unaccounted gas above 8%	74,558 77
Auditing expenses	6,000 00
Loss sustained in Municipal street lighting of 1 cu. ft. per hour, per lamp.....	6,458 42
Uncollectible gas bills.....	10,816 48
Excessive use of oils.....	75,000 00
Total deductions	$220,114 70
Net cost of gas supplied to commercial consumers	$864,234 67
Same per M. cu. ft. sold.....	.7047

Operating revenue (Deft. Ex. 23, p. 1104)	$1,186,650 28
Adjusted net profit	$322,415 61
Rate of return on stipulated rate base of $3,300,000 with appellant's earnings as shown above	9.77%

SUMMARY OF OPERATING COSTS WITH DEDUCTIONS CLAIMED BY DEFENDANTS FOR SIX MONTHS ENDED JUNE 30, 1920

Six months ended June 30, 1920

Total operating expenses, Taxes and Uncollectible bills	$795,139 84
Less cost of Municipal sales	22,216 22
Gross cost of sales supplied to commercial consumers	$772,923 62

Items applicable as deductions from above costs.

Shortage in delivery of coal	$687 13
Coal tonnage paid on account of Harbor strike, 1920	1,844 37
Excess of boiler fuel used over 3.77 cents per M. cu. ft. made	14,232 15
Shortage in delivery of oil	902 92
Excess over average repairs	38,980 51
Water gas Tar lost, 150,000 gallons	12,120 00
Unaccounted gas above 8%	39,063 68

Auditing expenses	3,000 0
Loss sustained in Municipal St. Lighting of 1 cu. ft. per hour	4,480 0
Uncollectible bills (gas).....	5,542 1
Excessive use of oil	37,500 0
Total deductions	$158,352 9
Net cost of gas supplied to commercial consumers	$614,570 9
Same per M. cu. ft. sold.....	.789
Operating revenue (Defts. Ex. 23, p. 1104)	$750,729 4
Adjusted on stipulated rate base of $3,300,000 with appellant's earnings as shown above	4.12

This showing takes no acount of the additiona reductions in coal, labor and other material tha would have resulted from an efficient operatio of a well-equipped plant.

The gross mismanagement of the responden in unnecessarily running its machines from Jun 1919 to June 1920 without the well-recognize proper cleaning would result, according to all test mony of respondent's and appellant's witnesse in greatly increasing the amounts of such mai items as coal and oil, so that the summaries o averages shown by respondent and calle "reasonable" by the experts, are unquestion ably excessive by such amounts.

There is no reason we know of why respon ent could not have saved a substantial sum b

the use of coke for generator fuel, for in 1919 it used 22,594.80 tons of generator fuel (Complt's Ex. 6, p. 1033), and any amount at which it could have purchased coke less than $8.40 a ton paid for coal (p. 156, Ex. 2, p. 1030) would have been a substantial saving.

Then there ought to have been a saving on account of drip oil, for in respondent's Ex. 6, (p. 1033), there is set forth an item of "condensation," 279,274,156 cubic feet of gas for 1919. There should naturally have been a large number of gallons of drip oil from this gas and a corresponding credit.

The amounts of excess are indefinite and uncertain, but the burden of proof is upon the respondent, and the appellants believe that the elimination of such excesses, that is, a showing of honest and efficient management, would result in figures for both 1919 and 1920 well under the annexed figures. At least the proof offered by respondent fell far short of proving that the statute is confiscatory.

POINT XII

Reversible errors were committed in the admission and exclusion of evidence.

The most serious errors committed by the Master and not corrected by the Court below, in the admission and exclusion of evidence are:

(1) The admission of respondent's books of account and the summaries and tabulations prepared therefrom which we have discussed in Point IX of this brief.

(2) Refusal to admit in evidence the proof sustaining the findings of Mr. Justice Greenbaum in the State Court action, numbered 1 to 25, inclusive, and 31 to 52, and excluded by the Master (pp. 741 749).

(3) The entire correspondence of the respondent (through its officer Elsman) with oil companies, regarding the respondent's oil supply for the years 1919 and 1920, excluded by the Master, being Defendants' Exhibits 25 to 34, for identification, offered by appellants, to rebut the respondent's claim that it was making an honest effort to get oil at the cheapest price (p. 1104).

(4) Defendants' Exhibit D24 for identification showing respondent's (1) comparative general balance sheet for the years ending December 31, 1904, to 1916, inclusive, (2) comparative statement of operating revenues and expenses, income and surplus for the years ending December 31, 1904, to 1916, inclusive, (3) disposition of gross corporate income for the years ending December 31, 1909, to 1916, (4) detail of operating expenses for the years 1909 to 1916, inclusive, (5) tax charges and payments for the years ended December 31, 1912, to 1916, inclusive, and (6) significant operating data for the years ended December 31, 1907, to 1916, inclusive (p. 1303).

(5) Testimony offered by appellants through the witness Howard and the witness Mitchell that the appellants had not been able properly to examine the accounts and records of respondent for the purposes of the trial.

(1) The question of the admissibility of respondent's books, summaries and tabulations we have discussed fully in this brief and in our brief

in the case of *Newton et al.* v. *Consolidated Gas Co.*, now before this Court.

(2) The refusal to admit in evidence proof to sustain the findings of Mr. Justice Greenbaum in the prior suit was prejudicial error (pp. 741–739). Although the judgment roll, with the decision and findings incorporated therein, in the respondent's former litigation is part of the record in this case, it was deemed advisable, to establish in this case, by independent proof, the most important points relating particularly to the financial history of plaintiff and its predecessor company. The respondent's counsel objected to such testimony and the Master upheld him upon the ground that, as the rate base was stipulated, testimony tending to show the history and capitalization of plaintiff or its predecessor company was irrelevant and immaterial (pp. 741 749). We submit that the Master's ruling in this respect was error. The Master has allowed the respondent to show its capitalization and also received testimony to the effect that in order that the company might borrow money it would be necessary to show it had earnings at least equal to twice its bonded indebtedness (witness Gardner, pp. 628-672; witness Hopson, pp. 238 267). As long as respondent was allowed to introduce testimony of the aforesaid character, appellants surely should have been allowed to offer testimony tending to show that part at least of the bonded indebtedness of this company did not represent any additions to its fixed capital; that, in view of the stipulated valuation of respondent's property now being

$3,300,000, and the outstanding bonds now aggregating $3,178,000, the respondent would be earning twice the interest of its bonds under the statutory rate, if its bonds had been restricted in issue to one-half the value of its property; and that the amounts paid in interest and dividends upon excessive bond and stock issues in the past should be viewed and considered by the Court in determining whether or not the statutory rate should be deemed confiscatory.

(3) Upon the question of the oil correspondence, Mr. Elsman produced four contracts under which the company procured its oil during 1919 and 1920, complainant's exhibits 19, 20, 21, and 22 (pp. 1038-1042). The witness was permitted to expatiate broadly upon his efforts to obtain oil at the best price (pp. 268-273). The appellants were undoubtedly entitled to rebut this testimony by whatever competent evidence they had available and manifestly they were entitled to such rebuttal as might appear in the written correspondence of Mr. Elsman which furnished *the only records* of his endeavors regarding other bidders. It is contended by the appellants that *the whole* of that correspondence indicates that his efforts were *pro forma* and a pretense; that the propositions he made therein were conditioned unnecessarily so as to prevent or discourage acceptance; and that the replies he received indicated that the respondent either could have obtained oil at more favorable prices, or, at least, that the sole dependence was not upon the tender mercies of the Standard Oil Company.

These perfunctory and feeble activities are to be viewed also in the light of the situation of the

rate-litigation of the respondent then pending and of the present litigation.

And as against the respondent's contention that the present oil prices may continue or may increase, that correspondence — every word of every page of it — together with all the other evidence of the management or mismanagement of the plant and business are highly important as bearing upon the appellants' contention that the respondent has not established beyond a fair or reasonable doubt, that, *under efficient and economical management*, as well as owing to the general trend of prices upon a declining abnormal period, the future prices will not, or cannot with ordinary diligence and prudence be made to progressively decrease.

The effort of the appellants to put that correspondence in evidence involved a discussion with the Special Master of much greater space upon the record, and of course, of much greater time, than the correspondence would have taken as an exhibit. The Court's attention is called respectfully to this discussion and to the manner in which the Special Master finally allowed some letters in evidence and then practically destroyed the whole effect and value thereof by insisting that the other letters should be lumped or summarized (pp. 814-825, 917-923).

(4) Defendants' Exhibit D24 (p. 1103) fully described above was clearly admissible to show the past experiences of the respondent and it was reversible error to exclude it. Likewise the testimony of witnesses Howard and Mitchell upon the question of the respondent's opportunity to examine the accounts and records of the respondent

was admissible. Such an examination is the *sine qua non* of appellants' defense in this action. If they were deprived of this privilege, they did not receive a fair trial. Testimony on this point was vital.

CONCLUSION

The decree herein should be reversed and the complaint dismissed with costs to the appellants because:

(a) A prior determination of the issues, denying the respondent equitable relief, under identical conditions, was *res adjudicata.*

(b) The respondent failed to establish beyond a doubt the unconstitutionality of the statute assailed.

(c) The respondent never experimented with the rate complained of, because an injunction was obtained restraining its enforcement before it was actually put into operation.

(d) The respondent came into equity with "unclean hands." It had persistently, flagrantly and deliberately violated the statute it asked to have declared unconstitutional.

(e) The Court and Master allowed excessive amounts for "unaccounted for gas."

(f) An item of $1,600,000 added by the Master to the stipulated rate base of $3,300,000 was declared by the Court to be "immaterial."

(g) The statute should not be declared confiscatory upon the financial showing obtained in an abnormal, post wartime period of one year and six months, disregarding profits in all prior years and what the experience of the respondent would be during a natural, normal future.

(h) There is such a nonjoinder of parties defendant as to make a determination of the confiscatory character of the statute impossible of determination.

(i) The books of the respondent and the tabulations compiled from them were improperly admitted in evidence.

(j) The respondent's plant was not operated in an efficient and economical manner. Gross inefficiency and mismanagement added greatly to the fair and reasonable cost of making and distributing gas.

(k) The Court and Master failed to deduct many improper items from the respondent's alleged operating costs. If these deductions had been made the 80-cent rate could not have been found confiscatory, even during the abnormal period taken.

(l) Reversible errors were committed in the admission and exclusion of evidence.

Dated, October 10, 1921.

Respectfully submitted,
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